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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

CHARLES D. MARSHALL, Warden; DANIEL E. LUNGREN, Attorney General of the State of California, *Petitioners*,

v.

ROBERT S. TURNER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals for the Ninth Circuit properly granted habeas corpus relief to a state prisoner by invoking a rule requiring a comparative analysis of jurors in resolving challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986), or whether instead such a rule violates the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), in light of contrary rules previously applied by state and federal courts.

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IN THE SUPREME COURT OF THE UNITED STATES

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CHARLES D. MARSHALL, Warden; DANIEL E. LUNGREN, Attorney General of the State of California, *Petitioners*,

v.

ROBERT S. TURNER, *Respondent*.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed July 29, 1997, and amended September 22, 1997.

OPINION OR JUDGMENT BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was reported, as amended upon the denial of rehearing, at 121 F.3d 1248 (9th Cir. 1997).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 29, 1997, and amended on September 22, 1997. Rehearing was denied on September 29, 1997. This petition for writ of certiorari followed within 90 days. 28 U.S.C § 2101(c); Supreme Court Rule 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On the evening of May 24, 1988, Roy Hunt was murdered in the living room of his home. The perpetrator had used a marble figurine to strike Hunt in the head multiple times. When the police found Hunt's body the next day, his watch, ring, wallet, television, VCR, and a candlestick were missing. The police found a blood spot among video cassette cases some distance from the body, as well as several cigarette butts, but no fingerprints.

In the early hours of June 4, 1988, Hunt's house was burglarized again. That morning, a police officer saw respondent Turner driving Hunt's car and promptly arrested him. In the car, the police found several of Hunt's belongings and a plastic container which held two of Hunt's teeth. In Turner's pocket, they found Hunt's ring. In later statements, Turner admitted that he had assisted in the June 4 burglary, but denied any involvement in the May 24 murder and robbery of Hunt.

At trial, expert testimony relating to tests on the blood found in Hunt's house revealed that it was consistent with Turner's blood, and that only 0.13 percent of the population have blood consistent with the sample.

A criminalist also testified that saliva found on the cigarette butts in Hunt's home was consistent with Turner's saliva. In addition, friends of Hunt testified that he always wore the ring, and that he had been wearing it on the evening of the murder.

Turner testified that he had gone to Hunt's house on June 4 at the direction of Donna Stephens, his brother's girlfriend. He helped load items from the house into a car (Hunt's), and secretly took some small items, including the gold ring, for himself. He claimed that he was on his way to sell the items when he was apprehended by the police. However, Stephens testified that she had no involvement in either incident. Several witnesses also testified that, prior to trial, Turner had given statements inconsistent with his testimony.

A jury convicted Turner of first degree (felony) murder, California Penal Code section 189; robbery, California Penal Code section 211; burglary, California Penal Code section 459; and use of a dangerous weapon in committing a felony, California Penal Code section 12022, subdivision (d). He was sentenced to life imprisonment without the possibility of parole. The California Court of Appeal denied his appeal. After the California Supreme Court denied review, Turner filed a petition for a writ of habeas corpus in federal district court. The district court denied the petition. The Court of Appeals for the Ninth Circuit reversed and remanded the case for an evidentiary hearing on the motivation for the prosecutor's use of peremptory challenges. *Turner v. Marshall*, 63 F.3d 807 (9th Cir. 1995).

An evidentiary hearing was held before the district court. Crediting the prosecutor's testimony at the evidentiary hearing, a magistrate recommended that the petition be dismissed. The district court entered judgment dismissing the petition.

Turner again appealed to the Ninth Circuit. The Ninth Circuit vacated the district court's denial of the

petition and ordered that Turner is entitled to a new trial. *Turner v. Marshall*, 121 F.3d 1248 (9th Cir. 1997) [*Turner II*].

REASONS THE WRIT SHOULD BE GRANTED

INTRODUCTION

At issue in this case is the method by which a federal court acting on habeas corpus review may review state court *Batson* rulings. *See Batson v. Kentucky*, 476 U.S. 79 (1986). The Supreme Court of California and the Fourth Circuit have held that, for purposes of *Batson*, an appellate court should not compare the responses of accepted jurors with those of stricken jurors. Disregarding both the California rule and *Teague v. Lane*, 489 U.S. 288 (1989), the Ninth Circuit has published this decision announcing on habeas review that such a comparative analysis must be performed.

This Court has never suggested *Batson* requires a comparative analysis. A comparative analysis is not constitutionally compelled, and has therefore been rejected in California and in the Fourth Circuit. The Ninth Circuit's preference for a comparative review may be authorized in the context of the court's supervisory authority in federal cases, but that mere preference cannot be imposed on California. The Ninth Circuit's insistence on a comparative analysis bodes ill for countless convictions in California in which a *Batson* claim was raised. Retroactive application of this new rule thus significantly impairs the state's legitimate interest in maintaining convictions secured through procedures that conformed with due process.

This case further represents the Ninth Circuit's chronic failure to apply the clearly-established prohibition

of *Teague v. Lane* against such new rules. This is a particularly egregious example since the Court of Appeals was repeatedly alerted to *Teague* but did not address the threshold *Teague* issue at all.

The case presents an issue of national importance because it illustrates that the Ninth Circuit has blurred the distinction between supervising the federal courts from the much narrower role of policing possible constitutional violation in state habeas cases, and has created a conflict among circuits in the process. *Teague v. Lane* prohibits the preference for remaking state procedure in the federal image. Rather than distinguish *Teague*, the Ninth Circuit now ignores *Teague*. Review is therefore warranted.

ARGUMENT

THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS VIOLATED TEAGUE v. LANE AND CREATED A CONFLICT AMONG CIRCUITS BY REQUIRING A "COMPARATIVE ANALYSIS" OF JURORS WHEN REVIEWING A CLAIM UNDER BATSON v. KENTUCKY, 476 U.S. 79 (1986)

The Court of Appeals for the Ninth Circuit has held that a reviewing court acting on habeas review will compare the responses of excused venire members with the responses of other venire members (i.e., engage in a "comparative analysis") when reviewing a state trial court's race-neutral explanation for peremptory challenges. The Court of Appeals' new approach to appellate review is not constitutionally compelled by precedent. *See Batson v. Kentucky*, 476 U.S. 79, 98, n. 21 (1986); *Hernandez v. New York*, 500 U.S. 352 (1991) (plurality op.). As a result, the

Ninth Circuit's new rule is barred by *Teague v. Lane*, 489 U.S. 288 (1989).

In *Teague*, this Court held that new constitutional rules may not be applied retroactively to cases for which direct review has been completed prior to the decision creating the new rule. *Id.*, at 310. In *Butler v. McKellar*, 494 U.S. 407 (1990), the Court reiterated that "a decision announces a new rule of the result was not *dictated* by precedent existing at the time the defendant's conviction became final. *Butler*, 494 U.S. at 412. A rule is not dictated by precedent if any reasonable jurists might have disagreed that such a rule necessarily followed prior decisions. *See Lambrix v. Singletary*, 117 S. Ct. 1517, 1725 (1997); *Graham v. Collins*, 506 U.S. 461, 476 (1993); *Sawyer v. Smith*, 497 U.S. 227, 234 (1990).

In *Batson*, this Court established a three-part procedure for evaluating a claim that a prosecutor has violated the Equal Protection Clause in using peremptory challenges. First, the defendant must make out a prima facie case of racial discrimination. Second, the burden shifts to the prosecutor to articulate a race-neutral explanation for the challenges. Third, the trial court must determine if the race-neutral justification is merely a pretext for discrimination. *Purkett v. Elem*, 514 U.S. 765 (1995) (per curiam); *Hernandez v. New York*, 500 U.S. at 358-59 (1995); *Batson v. Kentucky*, 476 U.S. at 96-98.[1]

The third prong of *Batson* is at issue here. Specifically, the question is how a *Batson* claim is to be reviewed by a federal appellate court on habeas review.

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1. Before *Batson* was decided, California already had recognized similar claims under the California Constitution. In *People v. Wheeler*, 22 Cal. 3d 258, 276, 148 Cal. Rptr. 890, 583 P.2d 748 (1978) the California Supreme Court held peremptory challenges may not be used to remove prospective jurors solely on the basis of group bias (e.g., membership distinguished on racial, religious, ethnic, or similar grounds).

The Ninth Circuit has here described the comparative analysis approach as a "well established tool."

In fact, the rule is far from "well established," even in the Ninth Circuit. That court had addressed the issue in only one prior habeas opinion, *Burks v. Borg*, 27 F.3d 1424 (9th Cir. 1994). The court in *Burks* acknowledged the novelty of a comparative review, and recognized that California "took a different approach . . . . The United States Supreme Court has not yet ruled on the role of comparative analysis on appellate review, so no one is quite sure whether our circuit or the California Supreme Court is right." 27 F.3d at 1427.

Burks makes clear the rule is decidedly unsettled, not well-settled. And the rule has also specifically been rejected by the Fourth Circuit in *United States v. McMillon*, 14 F.3d 948, 953-954, n.5 (4th Cir. 1994).

As noted in *Burks v. Borg*, the California Supreme Court has also rejected comparative analysis. In *People v. Johnson*, 47 Cal. 3d 1194, 1220-21 (1989), the California Supreme Court expressly declined to utilize comparative analysis. Accord, *People v. Montiel*, 5 Cal. 4th 877, 909, 21 Cal. Rptr. 2d 705, 855 P.2d 1277 (1993). In doing so, the state high court specifically relied on language in *Batson* that great deference should be given to the trial court's determination that use of peremptory challenges was not for an improper purpose. *Johnson*, at 1221; *Montiel*, at 909. Petitioner was tried in state court in California.

The California Supreme Court's reliance on *Batson* for refusing to engage in comparative analysis is justified. This Court has never suggested such an analysis is required. Instead, it has explicitly refused "to formulate particular procedures to be followed" when a *Batson*-type claim is made, noting the "variety of jury selection practices followed in our state and federal trial courts." *Batson v. Kentucky*, 476 U.S. at 99 and n. 24. This Court did recognize in *Batson* that the trial court's determination

of whether the defendant has established purposeful discrimination "largely will turn on evaluation of credibility." *Id.*, at 98, n. 21. Thus, the reviewing court will ordinarily give those findings "great deference." *Id.*

This Court reaffirmed the "great deference" rule in *Hernandez*, noting the issue of intent to discriminate under *Batson* is a pure issue of fact "subject to review under a deferential standard." *Hernandez v. New York*, 500 U.S. at 364. This rule makes "particular sense" because the finding turns on a credibility evaluation which is oftentimes based on the demeanor of the attorney exercising the challenge. This evaluation is "'peculiarly within a trial judge's province.'" *Id.*, at 365, quoting *Wainwright v. Witt*, 469 U.S. 412, 428 (1985).

Given the deferential standard of *Batson* and *Hernandez*, California's rejection of a comparative analysis is justified. The state's high court in *Johnson* outlined various problems with this approach, demonstrating why the device ignores the "great deference" rule. First, voir dire may take a substantial period of time and it is "unrealistic" to expect a trial judge to engage in a detailed review of the responses of every venire member before evaluating the good faith of the prosecutor's explanation. *See People v. Johnson*, 47 Cal. 3d at 1220. As noted by this Court in *Hernandez*, the *Batson* analysis is supposed to permit "prompt rulings" on peremptory challenge objections without "substantial disruption of the jury selection process." *Hernandez v. New York*, 500 U.S. at 358. If the trial court were forced to stop the trial to review all the juror questionnaires and often - prolonged voir dire, the trial would come to a halt. The burden is on the defendant, not the trial court, to prove purposeful discrimination.

Second, it is not appropriate to only compare the answers of some jurors who were left unchallenged, as the Ninth Circuit did, without also comparing the characteristics of the other jurors against whom the

prosecutor exercised peremptory challenges. Otherwise the comparison is "one-sided." *People v. Johnson*, 47 Cal. 3d at 1220.

Third, a straight comparison of similar answers does not take into account the variety of factors that go into a decision to keep certain jurors while challenging others. It is often a combination of factors that leads to exercise of a peremptory challenge, not a single response. The mix of jurors is significant and the mix may change as certain jurors are removed or seated in the box. One or two strongwilled or passive jurors may be acceptable, but not more. When assessing the mix, lawyers will consider age, education, training, employment, and a variety of other factors. *Id.*, at 1220.

Fourth, the weight a lawyer gives to various factors will change depending on the number of peremptory challenges remaining. At the beginning of voir dire, challenges may be exercised more freely, while used hesitantly when they are about to be exhausted. Moreover, toward the end of the process, a lawyer can better assess whether the jurors remaining in the courtroom are better or worse than those already sitting in the box and exercise challenges accordingly. A previously passed juror may be excused in the hope of drawing an even better juror. *Id.*, at [illegible]-21.

For the foregoing reasons, the California Supreme Court has concluded that the dynamics of the entire jury selection process make it "difficult, if not impossible," to evaluate from a cold record the peremptory challenge of one juror with the retention of another who appears on paper to be substantially similar. Such analysis "is highly speculative and less reliable" than the determination of the trial judge who witnessed the selection process and is inconsistent with the rule of giving "great deference" to the trial court. *Id.*, at 1221. Where the trial judge witnessed the entire voir dire proceedings, was aware of the judge's duty to be sensitive to the

manner in which peremptory challenges were used, and found no improper use of the challenges, the California Supreme Court, consistent with *Batson*, will not "second-guess" this factual determination. *Id.*, at 1221; accord *People v. Montiel*, 5 Cal. 4th at 909; *People v. Jackson*, 13 Cal. 4th at 1197.

The federal constitution does not require otherwise. The Ninth Circuit thus wrongly announced and applied a new rule in this case. This new rule authorizes, indeed requires, a federal appellate court to conduct a comparative review of jurors in habeas cases based only on a trial transcript rather than relying on a contemporaneous assessment of the jury by a state trial court sitting as fact-finder. This new rule requires a federal appellate court to engage in a comparative review even where, as here, a state court would be precluded from doing so as a matter of state law. The state is thereby punished for following a reasonable rule, adopted by the California Supreme Court and the Fourth Circuit, and state convictions raising *Batson* claims on habeas review in the Ninth Circuit are now jeopardized in light of this new rule.

The Ninth Circuit's new rule of comparative analysis is particularly ill-advised, and the *Teague* violation further aggravated, in light of the context of a habeas corpus proceeding in which, years after the trial, the trial prosecutor is confronted with a transcript of the voir dire and asked to address the subject of comparative review for the first time. This procedure, consisting solely of an interrogation of the prosecutor is no way resembles a contemporaneous hearing before the state trial court with both trial counsel and jurors present.

As this Court recognized in *Hernandez*, the evaluation of the prosecutor's credibility "lies particularly within a trial judge's province." 500 U.S. at 365. The trial judge, unlike the reviewing federal court, has observed the voir dire and the conduct of jurors as well as attorneys.

Not surprisingly, in every case cited by the Ninth Circuit panel as an example of comparative analysis involved a *Batson* hearing resolved by the judge who had presided over jury selection and could personally observe the voir dire. *See Doss v. Frontenac*, 14 F.3d 1313, 1316-17 (8th Cir. 1994); *United States v. Chincilla*, 874 F.2d 695, 698 (9th Cir. 1989); *Devose v. Norris*, 53 F.3d 201, 204-05 (8th Cir. 1995); *United States v. Iowa*, 34 F.3d 447, 452 (7th Cir. 1994), *cert. denied*, 513 U.S. 1117 (1995); *Davidson v. Harris*, 30 F.3d 963, 965 (8th Cir. 1994), *cert. denied*, 513 U.S. 1083 (1995); *Jones v. Ryan*, 987 F.2d 960, 973 (3rd Cir. 1993).

The Eleventh Circuit has recognized the essential role of the trial judge in evaluating voir dire and has described the difficulty in attempting a comparative review:

> The attributes relied upon by a prosecutor in striking potential jurors are not always easily compared, however, and often require an evaluation of the degree to which the prospective juror manifests the stated attribute . . . . The trial judge is in a superior position to determine whether white members of the venire who were not struck had a greater, lesser or the same degree of difficulty in following voir dire questions, or whether a prospective white jurors's familiarity with a family drug problem as significant as that of an excluded Black member of the venire.

United States v. Allston, 895 F.2d 1362, 1367, n.5 (11th Cir. 1990); accord *United States v. Bennett*, 928 F.2d 1548 (11th Cir. 1991).

The Eleventh Circuit and the California Supreme Court have recognized what the Ninth Circuit has refused to acknowledge -- the necessity of allowing the factfinder in a *Batson* hearing to personally observe not only the demeanor of the *prosecutor* but also to evaluate the *jurors'*

conduct during voir dire. The latter component is a crucial part of the factfinder's assessment of the prosecutor's credibility. Without it, a collateral court's isolation from the voir dire process precludes a full appreciation of the trial dynamics.

For all these reasons, comparative analysis on habeas review constitutes an unwise rule.

Worse, comparative review is at least a new rule within the meaning of *Teague v. Lane*. This Court has required the threshold issue of *Teague's* application to be addressed before the merits of a case are considered. *Lambrix v. Singletary*, 117 S. Ct. at 1523; *Caspari v. Bohlen*, 510 U.S. 383 (1994); *Penry v. Lynaugh*, 492 U.S. 302, 329 (1989); *Graham v. Collins*, 506 U.S. at 466. Respondent's brief and oral argument alerted the Ninth Circuit to the obvious involvement of *Teague* in this case, and pointed out the conflict with the Fourth Circuit, but the Ninth Circuit made no mention of *Teague* in this published decision. Nor did the court address *Teague* after respondent reiterated a *Teague* objection in an unsuccessful petition for rehearing and suggestion for rehearing *en banc*.[2]

This Court has consistently enforced *Teague* in a variety of different contexts, reminding federal courts not to apply new rules on collateral review. *Stringer v. Black*,

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2. The panel did modify its opinion after rehearing, but only to massage a different mistake. The panel originally held the prosecutor's motivation for the challenges in question was only "just as likely to mask impermissible considerations as to contain a legitimate justification." 1997 W.L. 420303, at 5. When requesting rehearing the State pointed out that such an admission of equipoise violated the deferential standard of review articulated by this Court in *Anderson v. City of Bessemer*, 470 U.S. 564 (1985) (and, in addition, *Hernandez v. New York*, 500 U.S. at 352). The panel then modified its opinion to replace the tentative language with an emphatic conclusion that "[w]e are of the firm conviction that no legitimate justification for the challenge was advanced." 121 F.3d at 1253.

503 U.S. 222 (1992); *Gray v. Netherland*, 116 S. Ct. 2074 (1996); *O'Dell v. Netherland*, 117 S. Ct. 1969 (1997); *Lambrix v. Singletary*, 117 S. Ct. at 1517; *Goke v. Branch*, 514 U.S. 115 (1995); *Caspari v. Bohlen*, 510 U.S. at 383; *Gilmore v. Taylor*, 508 U.S. 333 (1993); *Graham v. Collins*, 506 U.S. at 461; *Sawyer v. Smith*, 497 U.S. at 227; *Butler v. McKellar*, U.S. 494 at 412-14; *Saffle v. Parks*, 494 U.S. 484, 487-88 (1990). In only one case in which this Court has confronted a *Teague* challenge did the Court find the rule to have been dictated by precedent, and therefore not "new." *See Penry v. Lynaugh*, 492 U.S. at 329. As yet, this Court has never found an exception to *Teague*.

Conversely, the Ninth Circuit has regularly declined to apply *Teague*'s bar to new rules or has repeatedly declared that a new rule meets *Teague*'s exceptions. *See, e.g., McDowell v. Calderon*, ___ F.3d ___ (1997 WL 725767, 9th Cir. case number 96-99000, filed Nov. 24, 1997) (divided court finds rule requiring supplement to correct instructions in capital case "represents a routine application of well settled law to the facts of the case." (1997) WL 725767, *8); *Robbins v. Smith*, 125 F.3d 831, 835 (9th Cir. 1997) (rule invalidating California method for addressing no-merit appellate briefs "predetermined" by *Anders v. California*, 388 U.S. 924 (1967) and *Penson v. Ohio*, 488 U.S. 75 (1988); *Gallego v. McDaniel*, 124 F.3d 1065 (9th Cir. 1997) (finding that a Supreme Court opinion *upholding* a commutation instruction dictates *reversing* a death penalty conviction); *Moore v. Calderon*, 108 F.3d 261, 264 (9th Cir. 1997) (rule of timeliness of self-representation motions is not "new" because it was announced by Ninth Circuit prior to petitioner's case); *Rupe v. Wood*, 93 F.3d 1434, 1440-41 (9th Cir. 1996) (finding *Teague* not implicated by a rule requiring admission of polygraph evidence); *Snook v. Wood*, 89 F.3d 605, 611-13 (9th Cir. 1996) (rejecting asserted *Teague* bar to requirement that state trial court conduct colloquy with criminal defendant prior to allowing

self-representation); *Harmon v. Marshall*, 69 F.3d 957, 966-67 (9th Cir. 1995) (finding reasonable doubt instruction deficient in light of non-habeas Ninth Circuit precedent, and further finding that such error meets *Teague* exception of "fundamental fairness"); *Paradis v. Arave*, 20 F.3d 950 (9th Cir. 1994) (rejecting *Teague* defense on variety of issues without demonstrating identity of claim and prior precedent); *Fetterly v. Paskett*, 15 F.3d 1472, 1477-78 (9th Cir. 1994) ("notwithstanding the [Supreme] Court's crystal clear pronouncements, the panel rushes headlong to apply a new, incredibly broad rule [regarding construction of a criminal sentencing statute] retroactively to petitioner without even explaining why it may do so") [dis. op. of Kozinski, J.]; *McKenzie v. Day*, 57 F.3d 1461 (9th Cir. 1995) (finding *Teague* not implicated if underlying issue involves post-conviction proceedings); *Jimenez v. Myers*, 12 F.3d 1474, 1482 (9th Cir. 1993) (disapproving state method for dealing with deadlocked jury despite dissent's claim that "[i]f *Teague* does not bar retroactive application in these circumstances, it has no meaning at all") [dis. op. of Kozinski, J.]; *Jimenez v. Myers*, 40 F.3d 976, 981 (9th Cir. 1993) (amended opinion [construing trial judge's questions and comments as violating *Allen v. United States*, 164 U.S. 492 (1896)] is far more novel and far more dangerous than what the majority said the last time around") [dis. op. of Kozinski, J.; citing *Teague*]; *Beam v. Paskett*, 3 F.3d 1303, 1310-11 (9th Cir. 1993) (invoking *Hernon v. Lowry*, 301 U.S. 242 (1937) as justification for refusing to find that *Teague* bars conclusion that trial court's application of "continuing threat" aggravating sentencing factor violates Eighth Amendment, and alternatively finding the holding satisfies both *Teague* exceptions); *Blazak v. Ricketts*, 1 F.3d 891, 898, n.8 (9th Cir. 1993) (rejecting *Teague* defense to rule allowing consideration of evidence never presented in state court on question of mental competence); *Jeffers v. Lewis*, 974 F.2d 1075, 1079-81 (9th Cir. 1992) (finding that Ninth

Circuit's new rule regarding trial court's review of mitigation evidence in capital case was "dictated by prior [Ninth Circuit] precedent . . . [and] merely applied the teachings of *Lockett* [*Lockett v. Ohio*, 438 U.S. 586 (1978)] and *Eddings* [*Eddings v. Oklahoma*, 455 U.S. 104 (1982]" and therefore was not subject to *Teague*); *Beam v. Paskett*, 966 F.2d 1563, 1570, n.5 (9th Cir. 1992) (allowing new rule regarding instructional error in capital case as long as "we have twice [previously] applied the rule . . ."); *Coe v. Thurman*, 922 F.2d 528, 533-34 (9th Cir. 1990) (announcing a new rule ordering a state appellate court to decide a state appeal court within a specified time period, and finding "that the new rule *Coe* established is not the kind of rule of which *Teague* applies"); *Robinson v. Borg*, 918 F.2d 1387, 1389-1404 (9th Cir. 1990) (applying new rule regarding equivocal invocation of right to counsel even over dissent's extended discussion of *Teague* bar); *Ostrosky v. State of Alaska*, 913 F.2d 590, 594-95 (9th Cir. 1990) (new rule regarding mistake-of-law defense falls within the second exception to the new-rule prohibition); *Harris v. Vasquez*, 901 F.2d 724, 726-27 (9th Cir. 1990) (new rule regarding competency of psychiatric assistance "at least arguably" satisfies *Teague*'s fundamental fairness exception); *but see Gretzler v. Stewart*, 112 F.3d 992 (9th Cir. 1997).

Alternatively, the Ninth Circuit has misunderstood *Teague* as allowing a petitioner to raise a non-retroactivity doctrine when attacking a conviction. *See Campbell v. Wood*, 18 F.3d 662, 676 (9th Cir. 1994); *Clark v. Lewis*, 1 F.3d 814, 820 (9th Cir. 1996); *Henry v. Estelle*, 993 F.2d 1423 (9th Cir. 1993), rev'd on other grounds, *Duncan v. Henry*, 513 U.S. 364 (1995) (per curiam); *People v. Blodgett*, 997 F.2d 512, 524, n. 15 (9th Cir. 1993); *Campbell v. Blodgett*, 982 F.2d 1321, 1328, n. 5 (9th Cir. 1992); *Campbell v. Blodgett*, 978 F.2d 1502 (9th Cir. 1992); *Harris v. Vasquez*, 943 F.2d 930, 945 (9th Cir.

1990); *Harris v. Vasquez*, 949 F.2d 1497, 1512 (9th Cir. 1991); *but see Lockhart v. Fretwell*, 506 U.S. 364 (1993).

Consequently, this case is not an isolated example of the Ninth Circuit's efforts to eschew *Teague*.[3] This case therefore takes its place alongside many others in while the Ninth Circuit has casually dispensed with *Teague* and announced new rules despite *Teague*'s bar. And, it is impossible to determine those cases in which -- as here -- the Ninth Circuit refused to even respond to the *Teague* defense.

The Ninth Circuit's expansion of *Batson* in this case deserves review. *Batson* says nothing about whether a reviewing court may engage in a comparative analysis. The Ninth Circuit admitted as much in *Burks v. Borg* but, for purposes of this case, has characterized the new rule as "well-established." That is far from correct. No state court would have felt compelled to engage in a comparative analysis. On the contrary, the California Supreme Court had forbidden it. At a minimum, the Ninth Circuit should be instructed to at least consider the *Teague* implications of this case.

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3. The list of cases in which the Ninth Circuit has upheld a *Teague* defense is considerably shorter. *See*, *Gretzler v. Stewart*, 112 F.3d at 992; *Jones v. Gomez*, 64 F.3d 1373 (9th Cir. 1995); *Clabourne v. Lewis*, 64 F.3d 1375 (9th Cir. 1995); *Turner v. Marshall*, 63 F.3d 807 (1995) (*Turner I*); *Woolery v. Arave*, 8 F.3d 1325 (9th Cir. 1993); *Greenawalt v. Ricketts*, 943 F.2d 1020 (9th Cir. 1991); *Jackson v. Ylst*, 921 F.2d 882 (9th Cir. 1990); *Barker v. Estelle*, 913 F.2d 433 (9th Cir. 1990); *Harris v. Vasquez*, 913 F.2d 606, 622 (9th Cir. 1990); *Allen v. Bunnell*, 901 F.2d 820 (9th Cir. 1990).

CONCLUSION

For the foregoing reasons, the petitioners request that a writ of certiorari issue in this case.

Dated: December 24, 1997.

Respectfully submitted,

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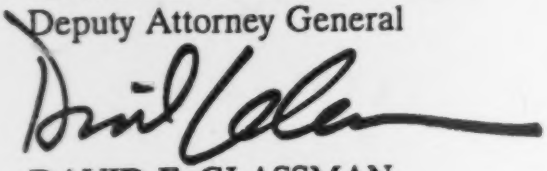

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT TURNER,
Petitioner-Appellant,

v.

CHARLES D. MARSHALL, Warden,
Respondent-Appellee.

No. 93-55477
D.C. No.
CV-92-04525-LGB(JR)
OPINION

Appeal from the United States District Court
for the Central District of California
Lourdes G. Baird, District Judge, Presiding

Argued and Submitted
June 6, 1995—Pasadena, California

Filed August 2, 1995

Before: Harry Pregerson, Cecil F. Poole,
and Dorothy W. Nelson, Circuit Judges.

Opinion by Judge D.W. Nelson

SUMMARY

**Criminal Law and Procedure/Juries/
Defendants and Accused, Rights of**

The court of appeals affirmed a district court judgment in part, vacated the judgment in part and remanded. The court held that an evidentiary hearing was warranted regarding an asserted *Batson* violation, where the percentage of available African-American venirepersons challenged and the percent-

age of peremptory challenges used against African-Americans both provided support for an inference of discrimination.

Roy Hunt was murdered. When police found his body, his watch, ring, wallet and other items were missing. Hunt's house was burglarized again, and a police officer saw appellant Robert Turner driving Hunt's car. Turner was arrested. In the car, the police found several of Hunt's belongings and a container which held two of Hunt's teeth. Hunt's ring was found in Turner's pocket. Turner admitted that he had assisted in the later burglary, but denied involvement in the earlier murder and robbery of Hunt.

Turner, an African-American, was charged with numerous offenses. During voir dire, the government used five out of nine peremptory challenges to exclude African-Americans (three men and two women) from the jury. At a time when four African-American women remained on the jury, Turner filed a *Batson* motion. The trial judge noted that the prosecutor had also excluded Caucasian venirepersons, and found no "pattern of individualized discrimination." Acknowledging that nine members of racial minority groups were present on the jury, the judge declined to inquire into the prosecutor's motives for her peremptory challenges.

At trial, expert testimony relating to tests on blood found in Hunt's house revealed that it was consistent with Turner's blood. A criminalist also testified that saliva found on cigarette butts in Hunt's home was consistent with Turner's saliva.

The record indicated that the court reporter read back testimony to the jury in the jury room outside of the presence of counsel and Turner. The jury convicted Turner of first degree (felony) murder, robbery, burglary, and use of a dangerous weapon in committing a felony. He was sentenced to life imprisonment without the possibility of parole. The California

Court of Appeal denied his appeal, and the California Supreme Court denied review.

Turner filed a petition for a writ of habeas corpus in the district court, which was denied. Turner appealed, contending, among other things, that the prosecutor impermissibly used peremptory challenges to remove African-Americans from the petit jury on account of their race, and that the readback of testimony outside the presence of Turner and his counsel violated his Sixth Amendment rights.

[1] Because any new rule defining what constitutes a "cognizable group" could not be applied to Turner's case, inquiry was limited to whether Turner made a prima facie case of impermissible exclusion of African-American jurors as a class, with no reference to gender. [2] In this case, Turner identified circumstances which raised an inference of discrimination. [3] Turner offered the statistical fact that the prosecutor had used peremptory challenges to exclude five African-Americans out of a possible nine African-American venirepersons. [4] The prosecutor's exclusion of five out of nine available African-American venirepersons removed a sufficient percentage of African-Americans to establish a pattern of discrimination. [5] The prosecution also used a significant percentage of its peremptory challenges against African-Americans. Out of the nine peremptory challenges made by the prosecution, five were made against African-Americans. [6] In addition, the state trial judge may have impermissibly relied on the fact that African-Americans and other minorities remained on the jury, without considering other factors. With only the trial court's incomplete analysis upon which to rely, the possibility of discrimination could not be foreclosed. [7] Turner established a prima facie case of a *Batson* violation, such that the state trial court erred in failing to inquire into the prosecutor's reasons for the peremptory challenges. Remand was ordered so that the district court could conduct an evidentiary hearing for the purpose of eliciting the prosecutor's

motives at the time of the voir dire in order to determine whether there was a *Batson* violation.

[8] The Ninth Circuit has held that failure to allow a defendant to be present at the readback of testimony is constitutional trial error. [9] Although Turner and his counsel had previously agreed to allow the jury to listen to a tape recording of testimony outside their presence, that waiver did not apply to the live readback of testimony. [10] Because there was no indication that Turner waived his right to be present in relation to the live readback, that readback outside his presence amounted to constitutional trial error. [11] Remand was ordered for the purpose of conducting an evidentiary hearing in order to determine whether the readback outside the presence of Turner and his counsel was harmless error.

[12] Because the evidence was sufficient to prove that Turner had committed robbery or burglary, his presence, the blood evidence, and the simultaneous murder of Hunt were sufficient to prove first degree felony murder.

[13] The prosecutor's reference to a defense laboratory, at worst, was an isolated, indirect reference to Turner's use of an attorney. The trial court took swift action by sustaining an objection, striking the statement and instructing the jury. Thus, Turner's claim of impermissible intrusion into the attorney-client privilege was rejected.

[14] None of several alleged incidents of prosecutorial misconduct compelled reversal.

[15] Turner alleged a due process violation arising from the failure of the trial judge to instruct the jury *sua sponte* on the offense of theft, which is a lesser included offense of robbery. [16] However, the Ninth Circuit has declined to find constitutional error arising from the failure to instruct on a lesser included offense in a noncapital case. Moreover, any finding

of constitutional error would create a new rule, inapplicable to this case.

COUNSEL

Richard D. Cleary, Los Angeles, California, and Robert Turner, *pro per*, Corcoran, California, for the petitioner-appellant.

David F. Glassman, Deputy Attorney General, Los Angeles, California, for the respondent-appellee.

OPINION

D.W. NELSON, Circuit Judge:

Petitioner-Appellant Robert Turner appeals the district court's denial of his petition for a writ of habeas corpus arising from his state court conviction for felony murder, robbery, burglary, and use of a dangerous weapon in committing a felony. Turner alleges that he was convicted in violation of his federal constitutional rights because (1) the prosecutor impermissibly used peremptory challenges to remove African-Americans from the petit jury on account of their race, in violation of the Equal Protection Clause of the Fourteenth Amendment; (2) a readback of testimony outside the presence of Turner and his counsel violated his Sixth Amendment rights; (3) there was insufficient evidence to support a felony murder conviction; (4) the prosecutor improperly commented on the attorney-client privilege; (5) prosecutorial misconduct infringed on Turner's right to due process of law; (6) the court improperly failed to instruct on the lesser included offense of theft; (7) the court discouraged the jury from requesting a readback of testimony; and (8) the court erred in using the California Jury Instruction on consciousness of guilt.

We have jurisdiction under 28 U.S.C. § 1291. We remand to the district court for an evidentiary hearing on Turner's claims of race-based peremptory challenges and violation of his Sixth Amendment right to be present at the readback of testimony. We affirm the district court's denial of the petition on the remaining claims.

BACKGROUND

On the evening of May 24, 1988, Roy Hunt was murdered in the living room of his home. The perpetrator had used a marble figurine to strike Hunt in the head multiple times. When the police found Hunt's body the next day, his watch, ring, wallet, television, VCR, and a candlestick were missing. The police found a blood spot among video cassette cases some distance from the body, as well as several cigarette butts, but no fingerprints.

In the early hours of June 4, 1988, Hunt's house was burglarized again. That morning, a police officer saw Turner driving Hunt's car and promptly arrested him. In the car, the police found several of Hunt's belongings and a plastic container which held two of Hunt's teeth. In Turner's pocket, they found Hunt's ring. In later statements, Turner admitted that he had assisted in the June 4 burglary, but denied any involvement in the May 24 murder and robbery of Hunt.

At trial, expert testimony relating to tests on the blood found in Hunt's house revealed that it was consistent with Turner's blood, and that only 0.13 percent of the population have blood consistent with the sample. The criminalist also testified that saliva found on the cigarette butts in Hunt's home was consistent with Turner's saliva. In addition, friends of Hunt testified that he always wore the ring, and that he had been wearing it on the evening of the murder.

Turner testified that he had gone to Hunt's house on June 4 at the direction of Donna Stephens, his brother's girlfriend.

He helped load items from the house into a car (Hunt's), and secretly took some small items, including the gold ring, for himself. He claimed that he was on his way to sell the items when he was apprehended by the police. However, Stephens testified that she had no involvement in either incident. In addition, several witnesses testified that prior to trial, Turner had given statements inconsistent with his testimony.

The jury convicted Turner of first degree (felony) murder, Cal. Penal Code § 189; robbery, *id.* § 211; burglary, *id.* § 459; and use of a dangerous weapon in committing a felony, *id.* § 12022(d). He was sentenced to life imprisonment without the possibility of parole. The California Court of Appeal denied his appeal, in which he presented the same issues presented to this court. After the California Supreme Court denied review, Turner filed a petition for a writ of habeas corpus in federal district court, which was denied.

STANDARD OF REVIEW

This court reviews a denial of a petition for a writ of habeas corpus de novo. *Sanders v. Ratelle*, 21 F.3d 1446, 1451 (9th Cir. 1994).

DISCUSSION

I. The *Batson* Claim

Turner, who is African-American, argues that under *Batson v. Kentucky*, 476 U.S. 79 (1986), the trial court erroneously determined that he had failed to make a prima facie case that the prosecution had engaged in discriminatory use of peremptory challenges, in violation of the Equal Protection Clause of the Fourteenth Amendment.[1] During voir dire, the government used five out of nine peremptory challenges to exclude

[1]Turner frames his challenge in terms of *People v. Wheeler*, 583 P.2d 748 (Cal. 1978), the case finding that discriminatory use of peremptory challenges violates the California Constitution. Because only federal constitutional claims are cognizable in federal habeas corpus proceedings, *Gutierrez v. Griggs*, 695 F.2d 1195, 1197 (9th Cir. 1983), we construe Turner's claims as alleging violations of federal constitutional rights and will only discuss them in such a light.

African-Americans (three men and two women) from the jury. For his part, Turner's counsel employed 19 peremptory challenges, excluding two African-American men. At the time of Turner's *Batson* motion, four African-American women remained on the jury. The trial judge, noting that the prosecutor had also excluded white venirepersons, stated that he saw no "pattern of individualized discrimination." Acknowledging the presence of nine members of racial minority groups on the jury at that time, the judge declined to inquire into the prosecutor's motives for her peremptory challenges.

Under *Batson*, a prosecutor's racially discriminatory use of peremptory challenges constitutes a violation of equal protection. 476 U.S. at 97. Initially, a defendant must establish a prima facie case that (1) the defendant is a member of a cognizable racial group; (2) the prosecution has removed members of such a racial group; and (3) circumstances raise an inference that the challenges were motivated by race. *Id.* at 96; *United States v. Bishop*, 959 F.2d 820, 824 n.6 (9th Cir. 1992); *United States v. Chinchilla*, 874 F.2d 695, 697 (9th Cir. 1989). At that point, the burden shifts to the government to articulate a race-neutral basis for the peremptory challenges. *Batson*, 476 U.S. at 97; *Chinchilla*, 874 F.2d at 697.

A. Cognizable Group

Because African-American women remained on the jury, Turner focuses on the exclusion of black men from the jury as the basis for a *Batson* violation. However, neither the Supreme Court nor the Ninth Circuit has recognized that the combination of race and gender, such as "black males," may establish a cognizable group for *Batson* purposes. *See United States v. Changco*, 1 F.3d 837, 839 (9th Cir.) (declining to address whether "minority women" are an identifiable class), *cert. denied*, 114 S. Ct. 619 (1993). In fact, the two circuits that have addressed this issue have held that a defendant may not seek *Batson* relief on the basis of exclusion of "black men" or "black women." *See United States v. Nichols*, 937

F.2d 1257, 1262 (7th Cir. 1991), *cert. denied*, 502 U.S. 1080 (1992); *United States v. Dennis*, 804 F.2d 1208, 1210 (11th Cir. 1986), *cert. denied*, 481 U.S. 1037 (1987).

[1] Although the issue of whether African-American men could constitute a *Batson* class likely is worthy of consideration in light of recent holdings that gender as well as race is an impermissible basis for peremptory challenges, *see J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1426 (1994); *United States v. DeGross*, 960 F.2d 1433, 1439 (9th Cir. 1992), we decline to consider this issue because any new rule defining what constitutes a "cognizable group" could not be applied to Turner's case. *See Teague v. Lane*, 489 U.S. 288, 299-300, 316 (1989); *Echlin v. LeCureux*, 995 F.2d 1344, 1351 (6th Cir. 1993) (finding that *Teague* precludes application of a new rule extending *Batson* to allow white defendants to challenge the exclusion of white jurors), *cert. denied*, 114 S. Ct. 552 (1993). Accordingly, we limit our inquiry to whether Turner has made a prima facie case of impermissible exclusion of African-American jurors as a class, with no reference to gender. *See Changco*, 1 F.3d at 839.

B. Inference of Discrimination

[2] Focusing on exclusion of African-Americans as a group, we find that Turner has satisfied the first two requirements of the prima facie case. The key issue, therefore, is whether Turner has shown that the facts and circumstances "raise an inference" of exclusion on the basis of race so as to require inquiry into the prosecutor's motives. *Batson*, 476 U.S. at 96. In assessing this issue, we note that "[t]here is no magic number of challenged jurors which shifts the burden to the government to provide a neutral explanation for its actions." *Chinchilla*, 874 F.2d at 698. "[T]he combination of circumstances taken as a whole must be considered." *Id.* We find that Turner has identified circumstances which raise an inference of discrimination.

[3] First, Turner offered the statistical fact that the prosecutor had used peremptory challenges to exclude five African-Americans out of a possible nine African-American venirepersons. A pattern of exclusion of minority venirepersons provides support for an inference of discrimination. *Batson*, 476 U.S. at 97; *United States v. Battle*, 836 F.2d 1084, 1085 (8th Cir. 1987). We have considered *Batson* arguments in several other cases in which the prosecution struck some, but not all, of the minority venirepersons. *See Bishop*, 959 F.2d at 822 (two of four black jurors stricken); *United States v. Lorenzo*, 995 F.2d 1448, 1453 (9th Cir.) (three of nine Hawaiian jurors stricken), *cert. denied*, 114 S. Ct. 227 (1993); *United States v. Power*, 881 F.2d 733, 740 (9th Cir. 1989) (one of two black jurors stricken).[2] Other circuits have found an inference of discrimination under similar circumstances. *See, e.g., United States v. Alvarado*, 923 F.2d 253, 255 (2d Cir. 1991) (finding a prima facie case when the prosecution struck four out of seven minority jurors); *Battle*, 836 F.2d at 1086 (finding a prima facie case when five of seven blacks were challenged).

[4] The fact that the prosecutor did not attempt to remove all the African-American jurors weighs against Turner's claim, but it is not dispositive. *See Montiel v. City of Los Angeles*, 2 F.3d 335, 340 (9th Cir. 1993); *Chinchilla*, 874 F.2d at 698 n.4. In fact, we have held that a trial judge "clearly erred" by refusing to inquire into the prosecutor's motives for peremptory challenges, in a case in which the prosecutor had excluded three Hispanics and two African-Americans, even though the government declined to strike a remaining minority venireperson. *Montiel*, 2 F.3d at 340.[3] The

[2]In these cases, because the trial court had inquired into the prosecutor's motivations for removing the jurors, we assumed the existence of a prima facie case and moved on to the analysis of the proffered reasons for removal.

[3]By contrast, we held in *United States v. Vaccaro*, 816 F.2d 443 (9th Cir. 1987), *cert. denied*, 484 U.S. 928 (1987), that striking the only two

courts in *Alvarado* and *Battle* similarly found an inference of discrimination even though the prosecution declined to challenge certain African-American venirepersons. *Alvarado*, 923 F.2d at 255; *Battle*, 836 F.2d at 1086. Thus, although the percentage of African-Americans challenged in the present case was lower than in *Montiel*, we conclude that the prosecutor's exclusion of five out of nine available African-American venirepersons removed a sufficient percentage of African-Americans to establish a pattern of discrimination.

[5] Not only did the prosecution strike a significant proportion of the available African-American venirepersons, but it also used a significant percentage of its peremptory challenges against African-Americans. Out of the nine peremptory challenges made by the prosecution, five were made against African-Americans. In *Montiel*, we found an inference of discrimination when the prosecution used five of its seven peremptories against African-Americans. 2 F.3d at 340.

As part of its consideration of whether an inference of discrimination has been raised, several courts have analyzed whether the percentage of prosecutorial challenges made against minorities was disproportionately higher than the percentage of the minority group within the venire. *See Alvarado*, 923 F.2d at 255-56 (finding a prima facie case because the prosecution challenged 50 percent of minority venirepersons, who represented only 30 percent of the pool); *United States v. Johnson*, 873 F.2d 1137, 1140 (8th Cir. 1989) (considering the disproportionate rate of strikes against blacks to

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African-Americans on the venire did not constitute a "pattern" of exclusion sufficient to establish a prima facie case. However, the *Vaccaro* court noted that the defendants had relied on the claim that there was a "pattern" of race-based strikes and therefore did not consider other means by which to establish an inference of discrimination. *See id.* at 457; *Batson*, 476 U.S. at 97. Moreover, its finding of a lack of a pattern was premised on the view that "just two" challenges does not establish such a pattern. In the present case, five African-Americans were excluded.

be relevant evidence of discrimination). Although the record lacks statistics on the racial makeup of the venire as a whole, approximately 30 percent (11 out of 37) of the venirepersons who appeared before the court for voir dire were African-American. Yet the government used a significantly higher percentage of its peremptory challenges — 56 percent — against African-Americans. Such a disparity also supports an inference of discrimination. *See Alvarado*, 923 F.2d at 256. Thus, two different statistics — the percentage of available African-Americans challenged, and the percentage of peremptory challenges used against African-Americans — provide support for an inference of discrimination.

[6] Finally, the state trial judge may have impermissibly relied on the fact that African-Americans and other minorities remained on the jury, without considering other factors. In response to Turner's *Batson* motion, the judge simply reviewed the racial and ethnic makeup of the excluded venirepersons and of the petit jury at the time of the motion, and concluded, "I don't see any pattern of individual discrimination at this point . . . I think we've got a fair mix right now."[4] He gave no indication that he considered the prosecutor's questions and statements during voir dire, the venirepersons' responses, or any other factors. *See Battle*, 836 F.2d at 1085 (noting that these factors should be considered). In denying a *Batson* motion, however, a trial court may not rely solely on the fact that some African-Americans remain on the jury. *See Palmer v. Estelle*, 985 F.2d 456, 458 (9th Cir.), *cert. denied*, 113 S. Ct. 3051 (1993). Regardless of the final racial makeup of the jury, the exclusion of a single minority juror on account

[4]Although we normally give great deference to a trial court's factual findings regarding purposeful discrimination in jury selection, this deference applies to the court's assessment of the prosecutor's state of mind and credibility. *See United States v. Bishop*, 959 F.2d 820, 826-27 (9th Cir. 1992). Because the trial judge made no inquiry into the prosecutor's reasons for excluding the African-American venirepersons, we need not defer to the judge's conclusory determination that there was no discrimination. *See id.*

of race would constitute a *Batson* violation. *See Bishop*, 939 F.2d at 827; *Johnson*, 873 F.2d at 1137. With only the trial court's incomplete analysis upon which to rely, we cannot foreclose the possibility of discrimination.

[7] We have stated that, in the prima facie analysis, "it is preferable for the court to err on the side of the defendant's right to a fair and impartial jury." *Chinchilla*, 874 F.2d at 698 n.5. Taken as a whole, the facts and circumstances reveal that Turner established a prima facie case of a *Batson* violation, such that the state trial court erred in failing to inquire into the prosecutor's reasons for the peremptory challenges. *See Montiel*, 2 F.3d at 340. Because of this omission, we remand for the district court to conduct an evidentiary hearing at which it must elicit the prosecutor's motives at the time of the voir dire in order to determine whether there was a *Batson* violation. *See Battle*, 836 F.2d at 1086.

II. Readback of Testimony Outside the Presence of the Defendant and Counsel

Turner alleges that the trial court allowed the court reporter to read back testimony to the jury outside the presence of Turner and his counsel, in violation of Turner's rights under the Confrontation Clause of the Sixth Amendment. The government argues that the record is too ambiguous to support Turner's claim. We disagree.

[8] Although the government correctly notes the discrepancies between the reporter's transcript and the clerk's transcript, the record indicates that on March 20, 1990, the reporter read back testimony to the jury "in the jury room outside the presence of counsel and the defendant." The government attempts to refute this evidence with the clerk's transcript, which indicates that Turner's counsel was "notified" of a readback on March 19, that the readback continued on March 20, and that the defendant and counsel were present in court on March 20. Because presence in court does

not prove presence in the jury room, this notation does not rebut the record evidence that a readback occurred outside Turner's presence. We have held that failure to allow the defendant to be present at the readback of testimony is constitutional trial error. *See Hegler v. Borg*, 50 F.3d 1472, 1477 (9th Cir. 1995); *United States v. Brown*, 832 F.2d 128, 130 (9th Cir. 1987).

[9] The government argues that even if Turner and his counsel were not present during the readback on March 20, they had waived their right to be present. We disagree. Although on March 16, Turner and his counsel both agreed to allow the jury to listen to a tape recording of testimony outside their presence, that waiver did not apply to the March 20 live readback of testimony. First, the parties had agreed in advance to a general policy that counsel should be present for readbacks. Any waiver, therefore, should be construed as a limited exception to this rule. Second, Turner's lawyer had carefully reviewed the tape and transcript to be presented to the jury on March 16. Since the waiver undoubtedly was based in part on the attorney's assessment that the playback of that tape would not unfairly prejudice his client, we should not construe the March 16 waiver to constitute a waiver of the right to be present at future readbacks, absent the opportunity to review the specific testimony to be read back in those instances. Third, a waiver of presence during the playing of a tape recording should not be construed to apply to a live readback of testimony, because the potential for prejudice is greater during a live readback.

[10] Moreover, the notation that counsel was notified, on March 19, of the March 20 readback does not constitute a waiver of Turner's right to be present. Even if the notification of counsel could be construed as a waiver of the right to have counsel present at the readback, the defendant must personally waive his right to be present. *See United States v. Kupau*, 781 F.2d 740, 743 (9th Cir.), *cert. denied*, 479 U.S. 823 (1986). Because there is no indication that Turner waived this

right in relation to the March 20 readback, we find that the readback outside his presence amounted to constitutional trial error. *See Hegler*, 50 F.3d at 1477.

Under *Hegler*, such error is subject to harmless error analysis. In the habeas context, an error is not harmless only if it "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1722 (1993). Although several analogous cases have found harmless error, they have done so after an evidentiary hearing at which the relevant parties, such as the court reporter or the jurors, were questioned. *See id.* at 1478; *Lee v. Marshall*, 42 F.3d 1296, 1298 (9th Cir. 1994) (finding after an evidentiary hearing that allowing the presence of a government agent in the jury room during a playback of testimony constituted harmless error); *Bustamante v. Eyman*, 456 F.2d 269, 274 (9th Cir. 1972) (requiring an evidentiary hearing to determine if a replay of jury instructions outside defendant's presence constituted harmless error). We would only dispense with an evidentiary hearing if the record clearly indicated that there was no prejudice. *Kupau*, 781 F.2d at 742 (finding harmless error when the record revealed that the judge explicitly warned the jury to ignore the presence of an FBI agent in the jury room during playback of testimony).

[11] However, in the present case, the record provides no indication of any attempts to dispel possible prejudice, or of any analysis into the circumstances surrounding the readback. "An evidentiary hearing on a habeas corpus petition is required whenever a petitioner's allegations, if proved, would entitle him to relief, and no state court trier of fact has, after a full and fair hearing, reliably found the relevant facts." *Tinsley v. Borg*, 895 F.2d 520, 530 (9th Cir. 1990), *cert. denied*, 498 U.S. 1091 (1991). Moreover, the danger of prejudice was particularly high because the readback in question dealt with the testimony on the critical blood tests. Because this case, in which all the evidence was circumstantial, turned on the credibility of the defendant and the reliability of labo-

ratory tests on very minute samples of blood and saliva, we cannot conclude based on this record that the error was harmless. *See Christian v. Rhode*, 41 F.3d 461, 468-69 (9th Cir. 1994) (considering the totality of the evidence in assessing harmless error). Accordingly, we remand to the district court for an evidentiary hearing in order to determine whether the readback outside the presence of Turner and his counsel was harmless error. *See Hegler*, 50 F.3d at 1478; *Brown*, 832 F.2d at 130; *Bustamante*, 456 F.2d at 275.

III. Sufficiency of the Evidence

Turner argues that there was insufficient evidence to convict him of felony murder, Cal. Penal Code § 189, or to find the "robbery-murder special circumstance" needed to impose a sentence of life imprisonment without parole, Cal. Penal Code § 1090.2(17)(a)(i),(vii).[5] A conviction based on insufficient evidence violates due process. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). Considering the evidence in the light most favorable to the prosecution, we review the record to determine if any rational trier of fact could find the elements beyond a reasonable doubt. *Id.*; *Hendricks v. Vasquez*, 974 F.2d 1099, 1106 (9th Cir. 1992). We reject Turner's claim.

To prove felony murder, the prosecution initially had to prove that Turner committed either robbery or burglary on May 24. Robbery is the "felonious taking of personal property in the possession of another, from his person or immediate

[5]First degree felony murder requires proof that a killing was committed "in the perpetration of" robbery, burglary, or other listed crimes. Cal. Penal Code § 189. The special circumstance finding, that the murder was committed while the defendant was engaged in robbery or burglary, differs slightly in that the government must show that the murder was committed "during the commission" of the robbery, such that the robbery was not "merely incidental" to the murder. *People v. Green*, 609 P.2d 468, 504 (Cal. 1980), *overruled on other grounds*, 226 Cal. Rptr. 112, 117 n.3 (1986); *People v. Zapien*, 846 P.2d 704, 735 (Cal.), *cert. denied*, 114 S. Ct. 315 (1993).

presence . . . by means of force or fear." Cal. Penal Code § 211. The blood and saliva evidence placed Turner at the scene, the ring and other personal items found in Turner's possession provided evidence of the taking of Hunt's property, and the killing of Hunt provided evidence of force. Although intent to steal is a required element, the jury could infer intent from the evidence that Turner had taken the property of another. *People v. Turner*, 789 P.2d 887, 895 (Cal. 1990), *cert. denied*, 498 U.S. 1053 (1991); *People v. Butler*, 421 P.2d 703, 706 (Cal. 1967).

Burglary is the entering of a house, apartment, or other listed structure with the intent to commit larceny or any felony. Cal. Penal Code § 459. The evidence that Turner had been present satisfied the entry element; although there was no evidence of forcible or unauthorized entry, this is not a requirement for burglary. *People v. Talbot*, 414 P.2d 633, 639 (Cal. 1966), *overruled on other grounds*, 462 P.2d 22, 29 (Cal. 1970).

[12] Since the evidence was sufficient to prove that Turner had committed robbery or burglary, his presence, the blood evidence, and the simultaneous murder of Hunt were sufficient to prove first degree felony murder. *See People v. Turville*, 335 P.2d 678, 685 (Cal.), *cert. denied*, 360 U.S. 939 (1959). Turner correctly notes that there would be no felony murder absent evidence that he formed the intent to steal *before* the murder: if he killed Hunt, and then decided to steal property, there would be no felony murder because there only would be theft, not robbery. *See Turner*, 789 P.2d at 895. However, in a very similar case, the California Supreme Court rejected this argument and found that evidence that the defendant was present, the victim was murdered, and property was taken allowed the jury to infer that the killing was done for purposes of robbery. *Id.* at 895.

Turner also found that this evidence sufficed to find the robbery-murder special circumstance. *Id.* The contrary cases

cited by Turner are distinguishable because the evidence in those cases included affirmative indications that the robbery was "merely incidental" to the murder, which would preclude the robbery-murder special circumstance. *See Turner*, 789 P.2d at 895. In *People v. Green*, 609 P.2d 468 (Cal. 1980), *overruled on other grounds*, 226 Cal. Rptr. 112 (1986), the court found insufficient evidence of a robbery-murder special circumstance where the defendant had expressed his intention to kill his ex-wife, killed her in a deserted area, and only removed her personal effects (the robbery) to make the body difficult to identify. *See id.* at 504-06. In *People v. Thompson*, 611 P.2d 883 (1980), the court found insufficient evidence for a robbery special circumstance because the evidence indicated that although the defendant had demanded money, this was just a cover for a revenge killing. *See id.* at 893-94. He actually had declined the victim's offer of money and a ring, and he did not steal any items. *See id.* Because the present case lacked such affirmative indications that the robbery was incidental to the killing, we rely on *Turner* and reject the claim that there was insufficient evidence.

IV. Comment on the Attorney-Client Privilege

Turner argues that the prosecutor improperly commented on the attorney-client privilege during her examination of the serology expert, Belmont Beasley. After the prosecutor had asked Beasley whether a laboratory hired by the defense had placed a red seal on the blood sample, the trial court sustained an objection, struck the question and response, and instructed the jury to disregard the statement. Based on the premise that the prosecutor's comment might have led the jury to believe that the defense had analyzed the sample, Turner claims that the jury may have drawn an adverse inference from the defense's failure to present evidence disputing the validity of the prosecution's findings. We review a claim of a Sixth Amendment violation de novo. *United States v. Hernandez*, 937 F.2d 1490, 1493 (9th Cir. 1991).

We reject Turner's claim. First, Turner provides no basis for a federal constitutional violation justifying a writ of habeas corpus. His reliance on *Griffin v. California*, 380 U.S. 609, 615 (1965) (holding that a prosecutor's comment on the defendant's failure to testify violates the Fifth Amendment), is misplaced because the prosecutor's question was analogous to a comment on the failure of the defense to present evidence — that the laboratory results were flawed — which would not violate federal constitutional rights. *See United States v. Lopez-Alvarez*, 970 F.2d 583, 596 (9th Cir.), *cert. denied*, 113 S. Ct. 504 (1992); *United States v. Castillo*, 866 F.2d 1071, 1083 (9th Cir. 1988).

Similarly, Turner's attempt to frame this incident as a violation of his Sixth Amendment right to counsel is misguided. The case he cites, *United States v. Irwin*, 612 F.2d 1182 (9th Cir. 1980), states that the government might impermissibly infringe on the attorney-client relationship by making disparaging comments about defense counsel or attempting to dissuade a defendant from conferring with his counsel. *See id.* at 1186-88. In the present case, the government has not intruded on Turner's relationship with his attorney to his detriment.

[13] Likewise, Turner's reliance on *United States ex rel. Macon v. Yeager*, 476 F.2d 613 (3d Cir.), *cert. denied*, 414 U.S. 855 (1973), is inappropriate because that case held that a prosecutor may not imply guilt by revealing that a defendant contacted a lawyer after arrest. *Id.* at 615; *see also Bruno v. Rushen*, 721 F.2d 1193, 1194 (9th Cir. 1983), *cert. denied*, 469 U.S. 920 (1984). The prosecutor's reference to a defense laboratory, at worst, was an isolated, indirect reference to the defendant's use of an attorney. *Cf. United States v. Bagley*, 772 F.2d 482, 495 (9th Cir. 1985) (stating that the court will not assume that the jury will construe an isolated remark as a comment on the failure to testify), *cert. denied*, 475 U.S. 1023 (1986). Significantly, the trial court took swift action by sustaining an objection, striking the statement, and instructing the jury. Such curative actions are usually presumed to neu-

tralize damage such that any error was harmless. *See Greer v. Miller*, 483 U.S. 756, 766 & n.8 (1987); *United States v. Simtob*, 901 F.2d 799, 806 (9th Cir. 1990). We therefore reject Turner's claim of impermissible intrusion into the attorney-client privilege.

V. Prosecutorial Misconduct

Turner asserts that several instances of alleged prosecutorial misconduct, taken together, infringed on his due process rights. A constitutional violation would arise if the incidents "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1979).

[14] We find that none of the alleged incidents, together or separately, compel reversal. Turner's principal objection is to the prosecutor's closing argument in which she recalled the victim's teeth, which were found in the possession of Turner, and labelled them as "a gruesome, horrible, horrific memento." She also called the perpetrator, though not Turner specifically, a "monster of a human being." Although arguably inflammatory, these comments are strikingly similar to comments upheld by the Supreme Court in *Darden v. Wainwright*, 477 U.S. 168 (1986), in which the prosecutor specifically called the defendant an "animal," labelled the crime as "the work of an animal," and argued that the defendant should not be let out of his cell without a leash. *Id.* at 179-80 & n.12. Accordingly, we find no due process violation arising from these comments.

Turner also criticizes the prosecutor's statement, in the presence of the jury, that if the court admitted into evidence a report offered by the defense, then it should admit part of a police report offered by the prosecution. In its most damaging light, this comment could be construed as a hint to the jury that unadmitted evidence existed that would tend to show Turner's guilt. Particularly because this comment made such

a reference only in the most indirect manner, if at all, it would not establish a due process violation. *See United States v. Freter*, 31 F.3d 783, 786 (9th Cir.) (finding no violation of substantial rights arising from a reference during closing argument to documents not admitted into evidence), *cert. denied*, 115 S. Ct. 646 (1994); *United States v. Molina*, 934 F.2d 1440, 1446 (9th Cir. 1991) (reference to the possibility that nine more agents could have corroborated the government's case was not plain error).

Turner also alleges that the prosecutor accused Turner of lying during cross-examination. Even if the question was argumentative, however, a prosecutor may label a witness's testimony as lies or fabrication. *See Molina*, 934 F.2d at 1445; *United States v. Birges*, 723 F.2d 666, 671 & n.1 (9th Cir.), *cert. denied*, 469 U.S. 863 (1984).

Finally, Turner claims that the prosecutor used leading questions and hearsay during its elicitation of the chain of custody from the serology expert, Belmont Beasley. In the discretion of the judge, some leading questions can be proper and would only justify reversal if their use amounted to a denial of a fair trial. *See Esco Corp. v. United States*, 340 F.2d 1000, 1005 (9th Cir. 1965); *see also United States v. Castro-Romero*, 964 F.2d 942, 943 (9th Cir. 1992). In this instance, there was no denial of a fair trial because the judge actually sustained objections to leading questions. The only arguable use of hearsay occurred during the testimony on the chain of custody of the blood samples. Whereas use of hearsay would justify reversal only if there was actual prejudice, *see Hardnett v. Marshall*, 25 F.3d 875, 880-81 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 942 (1995), Turner has given no indication that the alleged hearsay prejudiced his case. Accordingly, we find no due process violation arising from these or any of the other allegations of prosecutorial misconduct.

VI. Lesser Included Offense Instruction

[15] Turner alleges a due process violation arising from the failure of the judge to instruct the jury *sua sponte* on the

offense of theft, which is a lesser included offense of robbery. This argument fails because it would require application of a new rule of law in a habeas corpus case. *See Teague*, 489 U.S. at 299-300.

It is well-settled that failure to instruct on a lesser included offense in a *capital* case would be constitutional error if there were evidence to support the instruction. *Beck v. Alabama*, 447 U.S. 625, 638 (1980); *Hopper v. Evans*, 456 U.S. 605, 611 (1982). However, because the prosecution declined to seek the death penalty, the present case is properly classified as a noncapital case. *See Pitts v. Lockhart*, 911 F.2d 109, 112 (8th Cir. 1990) (holding that a case in which the death penalty was sought but not imposed is a noncapital case), *cert. denied*, 501 U.S. 1253 (1991); *Rembert v. Dugger*, 842 F.2d 301, 303 (11th Cir.) (holding that *Beck* applies when the defendant faces the possibility of the death penalty), *cert. denied*, 488 U.S. 969 (1988).

[16] There is no settled rule of law on whether *Beck* applies to noncapital cases such as the present one. In fact, this circuit, without specifically addressing the issue of extending *Beck*, has declined to find constitutional error arising from the failure to instruct on a lesser included offense in a noncapital case. *See Bashor v. Riley*, 730 F.2d 1228, 1240 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984). Of the circuits which specifically have addressed whether the *Beck* rule applies to noncapital cases, some find no constitutional right in noncapital cases. *See, e.g., Perry v. Smith*, 810 F.2d 1078, 1080 (11th Cir. 1987); *Trujillo v. Sullivan*, 815 F.2d 597, 602 (10th Cir.), *cert. denied*, 484 U.S. 929 (1987). Others would only apply *Beck* to noncapital cases to prevent a "fundamental miscarriage of justice." *See, e.g., Tata v. Carver* 917 F.2d 670, 672 (1st Cir. 1990); *Nichols v. Gagnon*, 710 F.2d 1267, 1272 (7th Cir. 1983), *cert. denied*, 466 U.S. 940 (1984). Still others have extended the *Beck* rule generally to noncapital cases. *See, e.g., Vujusevic v. Rafferty*, 844 F.2d 1023, 1027 (3d Cir. 1988); *Ferrazza v. Mintzes*, 735 F.2d 967, 968 (6th Cir.

1984). With the intercircuit split on whether the lack of a lesser included offense instruction in a noncapital case presents constitutional error, any finding of constitutional error would create a new rule, inapplicable to the present case under *Teague*. Because Turner has not asserted a constitutional error upon which relief could be granted, we reject his claim.

VII. Intimidation of the Jury

Turner also argues that the trial judge, by asking the jury not to abuse the right to have the court reporter read back testimony to the jury, engaged in intimidation of the jury. The decision to allow a readback of testimony is reviewed for abuse of discretion. *United States v. Birges*, 723 F.2d 666, 671 (9th Cir.), *cert. denied*, 469 U.S. 863 (1984).

In *Birges*, the court found no error in the trial judge's refusal to allow a readback of testimony, absent a showing of prejudice. *Id.* at 671. If an outright refusal to allow a readback does not amount to federal constitutional error, then the trial judge's statement, "I want you to use [the readback privilege] if you need it but please don't utilize the reporter frivolously," did not violate Turner's constitutional rights. Furthermore, there is no evidence of prejudice in the present case, since the jury asked for and was allowed a readback on several occasions. We therefore find no abuse of discretion.

VIII. Instruction on Consciousness of Guilt

Turner argues that the trial court erred in giving a particular consciousness of guilt instruction, California Jury Instruction (CALJIC) No. 2.03. In a habeas corpus case, a jury instruction requires reversal only if it "so offended established notions of due process as to deprive [the defendant] of a constitutionally fair trial." *Cupp v. Naughten*, 414 U.S. 141, 144 (1974).

The court's instruction was as follows:

> If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination."

CALJIC No. 2.03.

In California, this instruction is proper in cases in which there is testimony indicating that before trial the defendant had made several statements, relating to the crime, which were inconsistent with each other. *See Green*, 609 P.2d at 492 & n.27; *People v. Kane*, 198 Cal. Rptr. 73, 79 (Ct. App. 1984). In the present case, Turner at one point had told the police that he took Hunt's ring from the house during the June 4 burglary, but later stated that Donna Stephens had given it to him four days before that burglary. He also gave different accounts of his activities during that burglary. Thus, the instruction had a proper factual basis under California law.

To the extent that Turner argues that the instruction violated his constitutional rights, we have upheld the use of a very similar consciousness of guilt instruction. *See United States v. Perkins*, 937 F.2d 1397, 1401-02 & n.2 (9th Cir. 1991). So long as the instruction does not state that inconsistent statements constitute evidence of guilt, but merely states that the jury may consider them as indicating a consciousness of guilt, the instruction would not violate constitutional rights. *See id.* Because CALJIC No. 2.03 fits this requirement, we find no constitutional error.

CONCLUSION

We vacate the district court's denial of the petition as it relates to the *Batson* claim and the claim of a readback of tes-

timony outside the presence of the defendant and his counsel, and we remand to the district court for an evidentiary hearing on these claims. We affirm the district court's rulings on the remaining claims.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

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APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT S. TURNER,
Petitioner-Appellant,
v.
CHARLES D. MARSHALL, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondents-Appellees.

NO. 96-56462
D.C. No. CV-92-04525-LGB
OPINION

Appeal from the United States District Court
for the Central District of California
Lourdes G. Baird, District Judge, Presiding

Argued and Submitted
June 3, 1997—Pasadena, California

Filed July 29, 1997

Before: Betty B. Fletcher, Harry Pregerson, and Dorothy W. Nelson, Circuit Judges.

Opinion by Judge Nelson

SUMMARY

Criminal Law and Procedure/Juries

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that under *Batson v. Kentucky*, 476 U.S. 79 (1986), a prosecutor cannot base a challenge to an otherwise qualified black juror on his

aversion to gory photographs, while accepting a white person who expresses a greater squeamishness.

In the California murder trial of appellant Robert Turner, the prosecutor exercised nine peremptory challenges, five of which were directed at African-Americans. Although she had additional peremptory challenges, the prosecutor left four African-American women. When the jury was seated, all African-American men in the jury pool had been excluded.

One of the black men the prosecutor challenged was Romeo McCain. He testified that he had served as a military policeman in Vietnam, was married with two children, worked in a managerial position, and had a brother-in-law who was a federal law-enforcement agent. He acknowledged that he would not want to look at the prosecution's gory photographs, but that it was "no problem," and that he could do so if necessary without being intimidated.

When the prosecutor examined Rosemary Battaglia, she said that she had a problem with looking at the photographs, that she was very squeamish about such things, and that it would be "really uncomfortable" for her to do so. She replied "I guess so" when the prosecutor asked if she could view the exhibits if they were in evidence. The prosecutor accepted Battaglia.

Turner objected to the prosecution's use of peremptory challenges to strike black jurors. The trial court concluded that Turner had not established a pattern of individual discrimination, and declined to inquire into the prosecution's motives.

During deliberations, the jury asked for a readback of the testimony of a prosecution forensic witness who had presented crucial blood evidence linking Turner to the killing. The court reporter read the testimony in the jury room. Neither Turner nor his attorney was in the jury room, and neither had

waived Turner's right to be present. The jury convicted Turner and he was sentenced to prison.

Turner exhausted his state postconviction remedies and sought federal habeas corpus relief. The district court denied his petition. The court of appeals vacated the judgment, holding that Turner had established a prima facie case of racial discrimination in jury selection, and that the readback was constitutional error.

On remand, a magistrate judge (MJ) conducted an evidentiary hearing to determine whether the State had violated Turner's rights under *Batson* to have a jury selected without racial bias, and whether the trial court's violation of his Confrontation Clause rights was prejudicial error.

During the evidentiary hearing, the prosecutor asserted that she had challenged McCain solely because he displayed hesitancy about looking at gruesome photographs. The court reporter testified that she generally reread testimony in a monotone, without emphasis or facial expression, and that she had no reason to believe that she strayed from that practice in Turner's case. She did not recall any extraneous communication with the jury.

The MJ concluded that no *Batson* violation had occurred, and that the readback was harmless error. The district court adopted the MJ's findings and dismissed Turner's habeas petition. Turner appealed.

[1] The district court clearly erred in accepting the prosecutor's explanation for striking McCain. [2] On the surface, McCain possessed all the attributes of a classic prosecution juror. The prosecutor's concern about the photographic evidence was facially nondiscriminatory, but she seated a white juror who was hesitant to view the photographs. McCain affirmed in his colloquy with the prosecutor that he would do his duty as a juror and look at the photographs. Battaglia

offered only an ambiguous "I guess" after similar questioning. There was no perceivable basis in the jurors' responses on which to distinguish the challenged and unchallenged jurors. Not only were their responses similar, but Battaglia expressed even greater reluctance to view the photographs.

[3] The prosecutor's unequivocal statement at the evidentiary hearing was that the *only* explanation she could offer for striking McCain was his reluctance to view the photographs. Arguments that the State made since the evidentiary hearing did not form part of the prosecutor's explanation, and she did not put forward other reasons, in addition to the trait shared with the unchallenged juror, that would have enhanced her credibility.

[4] The prosecutor's remarks about McCain's "admirable background" indicated that his military record made her *favorably* disposed toward him as a juror. [5] Because the reluctance to view photographic evidence was the only reason actually proffered for McCain's exclusion, the prosecution's failure to challenge the similarly situated white juror was fatal to its explanation.

[6] The record supported the district court's conclusion that Turner's absence from the jury room during the readback was harmless error. Turner could not establish actual prejudice, and nothing in the witnesses' statements aroused "grave doubt" about whether the error had injurious effect.

[7] The evidence at the hearing indicated that the court reporter read the testimony without inappropriate inflection or comment. Even though the testimony in question involved the key forensic witness, potent circumstantial evidence supported the jury's verdict. There was no evidence of improper conduct or prejudicial impact.

COUNSEL

Richard D. Cleary, Los Angeles, California, for the petitioner-appellant.

David F. Glassman, Deputy Attorney General, State of California, Los Angeles, California, for the respondents-appellees.

OPINION

D.W. NELSON, Circuit Judge:

California state prisoner Robert Turner appeals the district court's denial of his petition for a writ of habeas corpus. Turner argues that the State engaged in purposeful discrimination in selecting his trial jury. He further claims that the state trial court committed prejudicial error when it allowed the jury to hear the readback of testimony in the absence of the defendant or his counsel.

We have jurisdiction pursuant to 28 U.S.C. §§ 1291 & 2253, and we affirm in part and reverse in part. Although we agree that the readback of testimony was harmless error, we believe that a comparative analysis of a challenged and an unchallenged juror indicates racial discrimination in the jury selection process. Accordingly, we vacate the district court's denial of Turner's petition.

I. Factual and Procedural Background

In March 1990, Turner was tried in California Superior Court for first degree felony murder, robbery, and burglary. During jury selection, Turner's counsel struck 19 prospective jurors, including two African-American men. The prosecutor used five out of the nine peremptory challenges she exercised to exclude African-Americans from the jury. Although she

could have employed additional peremptory challenges, the prosecutor left four African-American women on the jury panel. However, when the jury was seated, all of the African-American men in the jury pool had been challenged or excused. Turner objected to the prosecution's use of peremptories under *People v. Wheeler*, 583 P.2d 748 (Cal. 1978), which holds that the discriminatory use of peremptory challenges violates the California Constitution. But the trial judge concluded that Turner had not established a "pattern of individual discrimination" and declined to inquire into the prosecutor's motives.

Turner's trial lasted for two weeks, and the jury began its deliberations on March 15, 1990. On March 19, the jury requested the readback of testimony by police department criminalist Lee Mann, who had presented the crucial blood evidence linking Turner to the murder. The court reporter read Mann's testimony to the jury in the jury room on March 19-20. The record reflects that neither Turner nor his counsel were in the jury room for the readback, and that neither of them had waived the right to be present.

On March 21, 1990, the jury entered a guilty verdict on all three charges, determined that Turner had used a deadly weapon in committing the offenses, and found that he had committed murder in the course of committing the burglary and robbery. Turner received a sentence of life imprisonment without the possibility of parole on the murder count, and the trial court stayed imposition of sentence as to the burglary and robbery. The California Court of Appeal affirmed Turner's conviction, and the California Supreme Court denied his petition for review.

Turner then filed a petition for a writ of habeas corpus in federal district court, which was denied. On appeal, this court ruled that Turner had established a prima facie case of racial discrimination in jury selection and concluded that the readback of Mann's testimony amounted to constitutional trial

error. *Turner v. Marshall*, 63 F.3d 807, 814-15 (9th Cir. 1995) [*Turner I*]. Accordingly, we vacated the denial of Turner's petition and remanded to the district court for an evidentiary hearing to develop Turner's *Batson* claim and to determine whether the state trial court's violation of his Confrontation Clause rights was prejudicial error. *Id.* at 820.

On April 25, 1996, a magistrate judge conducted an evidentiary hearing at which the prosecutor, the court reporter from Turner's trial, a trial juror, and Turner himself testified. The prosecutor acknowledged that she had no independent recollection of the five African-American jurors in question, but she offered explanations for her challenges derived from the voir dire transcript and her "partial" notes. Although the court reporter and the juror could not remember details of the readback of Mann's testimony, they recalled nothing remarkable about it. The questioning of Turner confirmed that he had neither heard the readback nor waived his right to be present. After hearing this testimony, the magistrate judge concluded that no *Batson* violation had occurred and that the readback was harmless error. The district court adopted the magistrate's findings and dismissed the petition. Turner subsequently was granted a certificate of appealability to challenge the denial of his habeas petition.

II. Standard of Review

We review the district court's decision to deny Turner's habeas petition de novo. *Johnson v. Vasquez*, 3 F.3d 1327, 1329 (9th Cir. 1993). We accord substantial deference to the findings of fact underlying the district court's ruling on racial discrimination in jury selection and will overturn these findings only to correct clear error. *See Hernandez v. New York*, 500 U.S. 352, 364 (1991); *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986); *Johnson*, 3 F.3d at 1329.

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III. Discussion

A. The Adequacy of the *Batson* Hearing

We note at the outset that the procedural posture of this case, and the years intervening between voir dire and the evidentiary hearing, are indicative of a larger problem with the *Batson* rule in practice. Because no factfinder has had the benefit of contemporaneous explanations from the prosecutor, we have before us only a minimally adequate record to examine for evidence of discriminatory purpose. We believe that the trial judge who observes jury selection firsthand is best suited to conduct this inquiry. Had the trial court required the prosecutor to articulate her reasoning at the time that Turner raised questions about the State's use of peremptories, the record would have provided a richer basis for our decision.

Our review is further hindered by the prosecutor's failure to prepare for the evidentiary hearing. Although we do not fault the prosecutor for her diminished memory six years after jury selection, we note that she testified that she had not reviewed the voir dire transcript in preparation for the evidentiary hearing and that she was "caught up" in another trial. We are fully cognizant of the weighty caseload government attorneys carry, but we believe that the federal court's inquiry into a potential constitutional violation deserved the prosecutor's full attention.

Although both the lack of a contemporaneous explanation and the prosecutor's limited recollection are troubling, we conclude that the transcripts of voir dire and the evidentiary hearing yield a sufficient basis for review. Our decisions in *United States v. Thompson*, 827 F.2d 1254, 1262 (9th Cir. 1987), and *United States v. Alcantar*, 897 F.2d 436, 439 (9th Cir. 1990), do not control. In those cases we noted that the passage of time could render a *Batson* hearing "meaningless." *See Thompson*, 827 F.2d at 1262. But there we contemplated a situation in which "no evidence was presented" and no

information about excluded and accepted jurors was available. *See Alcantar*, 897 F.2d at 438. Here, the prosecutor did not admit to a total inability to reconstruct the events of jury selection; she claimed that she generally could recall the trial and that reviewing the transcript had refreshed her recollection of voir dire, and she articulated explanations for each of the disputed challenges. Thus the defense has been afforded ample opportunity "to point out false factual assumptions, or improper motivations in the prosecution's explanations." *Id.*

Accordingly, we reject Turner's argument that the prosecutor failed to meet her burden of producing specific reasons for her challenges, and we proceed to examine the trial court's ultimate determination that the State did not engage in purposeful discrimination. *See Hernandez*, 500 U.S. at 359.

B. Evidence of Purposeful Discrimination in the Jury Selection

[1] We conclude that the district court clearly erred in accepting the prosecutor's explanation for striking African-American prospective juror Romeo McCain. We believe that the prosecutor's stated reasoning is revealed as pretextual in the light of a comparison between McCain and a nonminority juror who ultimately was empaneled.

A comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination. Peremptory challenges "cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged." *Doss v. Frontenac*, 14 F.3d 1313, 1316-17 (8th Cir. 1994); *see United States v. Chinchilla*, 874 F.2d 695, 698-99 (9th Cir. 1989) (holding that a struck juror's place of residence was an inadequate explanation for a challenge because an unchallenged juror resided in the same location); *see also Devose v. Norris*, 53 F.3d 201, 204-05 (8th Cir. 1995); *United*

States v. Sowa, 34 F.3d 447, 452 (7th Cir. 1994), *cert. denied*, 513 U.S. 1117 (1995); *Davidson v. Harris*, 30 F.3d 963, 965 (8th Cir. 1994), *cert. denied*, 513 U.S. 1083 (1995); *Jones v. Ryan*, 987 F.2d 960, 973 (3d Cir. 1993).

[2] On the surface, McCain possesses all of the attributes of a classic prosecution juror. He testified that he served as a military policeman in Vietnam, that he was married with two small children, and that he worked as a production supervisor for Garrett Air Research. He also informed the court that he had a brother-in-law who was a DEA agent. At the evidentiary hearing, the prosecutor offered the following explanation for striking McCain:

> [H]e had a hesitancy toward looking at gruesome photographs that would [be] shown in a homicide case, such as this, with a blunt-force instrument trauma inflicted on the victim. This was a very brutal case, and he would not like to be part of looking at those photographs, which is a necessary job that the jurors have.

The prosecutor's concern about the photographic evidence is facially nondiscriminatory, but she also seated a white juror who was hesitant to view the photographs. Indeed, whereas McCain affirmed in his colloquy with the prosecutor that he would do his duty as a juror and look at the photographs, Rosemary Battaglia offered only an ambiguous "I guess" after similar questioning. We perceive no basis in the jurors' responses during voir dire upon which to distinguish the challenged and unchallenged juror.

Romeo McCain

> Ms. Davidson: So you can look at pictures and not be in any way intimidated by the pictures?
>
> Prospective Juror No. 8: No.

Ms. Davidson: Okay. Because you—some people, you know, we don't all come from the same background. And Vietnam was a terrible experience for you, I'm sure, but it toughened you up for other things, I'm sure. And the people that haven't had that experience it might not be okay to see pictures; for you it might be okay.

No problem?

Prospective Juror No. 8: Yes.

Ms. Davidson: What's that look I just got?

Prospective Juror No. 8: I'm thinking about I really wouldn't want to see them, the pictures.

Ms. Davidson: Well, good for you. Who wants to see pictures like that, if you're a normal human being.

If it's your job as a juror, though, you'd look at it?

Prospective Juror No. 8: Yes.

Rosemary Battaglia

Ms. Davidson: Is there anything about you that you think I should know?

Prospective Juror No. 3: I would have a problem looking at gory pictures. I just — I just am very squeamish about that type of thing.

. . .

Ms. Davidson: Well, that only —It's ghoulish to think that any of us want to sit there and look at unpleasant photographs, gruesome pictures of things. But as a juror, it's your duty to look at these photo-

graphs, if there are any photographs, because I don't want to ask you to prejudge the evidence —

Prospective Juror No. 3: Right.

Ms. Davidson: Okay, can you, as part of your duty, look at the photographs, even if it's unpleasant, because you understand we don't want people that are going to look at gory photographs —

Prospective Juror No. 3: I understand that.

Ms. Davidson: Okay.

Prospective Juror No. 3: I probably could but it would be really uncomfortable.

Ms. Davidson: Well, nobody is going to ask you to stare at anything or — you know, anything like that. So if it's for some purpose of evidence to look at a photograph, you can do that, right?

Prospective Juror No. 3: I guess.

Not only are their responses similar, but Battaglia expressed even greater reluctance to view the photographs.

[3] We are mindful of the prosecutor's unequivocal statement at the evidentiary hearing that the *only* explanation she could offer for striking McCain was his reluctance to view the photographs:

Q: Sitting here today, do you recall any reason you challenged Mr. McCain, other than his — what you described as his reluctance to look at crime photographs?

A: No, I don't.

> Q: Sitting here today, you don't have any recollection, do you, of why you changed your mind about Mr. McCain, do you?
>
> A: I don't. I can only tell you the part of the photographs —

Thus, we do not confront a case in which the prosecutor offered several explanations for a peremptory strike, and a seated juror shares *some* of the same characteristics cited as justifications. *Compare United States v. Lewis*, 837 F.2d 415, 417 & n.5 (9th Cir. 1988) (concluding that there was a nondiscriminatory basis for a peremptory challenge where the decision to strike hinged on "the interplay of various factors" identified by the prosecutor and "no unchallenged juror possessed all the cited characteristics"). The arguments that the State has made since the evidentiary hearing do not form part of the prosecutor's explanation, and we conclude that she has not "put forward other reasons, in addition to the trait shared with the unchallenged juror[ ], which [would have] enhanced [her] credibility." *United States v. Alvarado*, 951 F.2d 22, 25 (2d Cir. 1991).

[4] The State insists that the prosecutor struck McCain, and not Battaglia, because McCain's status as a Vietnam veteran was in tension with his squeamishness. The magistrate judge agreed that his "hesitancy to view crime photographs appeared incongruous with his Vietnam War veteran background." The record does not, however, support the attribution of such a motive to the prosecutor. Although she questioned McCain about his experiences in Vietnam in conjunction with raising the subject of the photographs, the prosecutor suggested that his background might make it easier for him to view gruesome photographs. Indeed, the prosecutor's remarks about McCain's "admirable background" indi-

cate that his military record made her *favorably* disposed towards him as a juror.[1]

[5] The State conceded at oral argument that the prosecutor never explicitly identified any incongruity between McCain's military experience and his reluctance. But according to the State, "[t]he irony of his diffidence, in light of his military experience, was obvious." We see no indication that the prosecutor perceived any "irony" in McCain's responses; nor is any such irony apparent. Thus, we reject the State's argument that the import of McCain's status as a veteran was implicit. We also doubt that the prosecutor intended to invoke McCain's military experience when she stated that she "felt that he would not make a good juror on reflection — upon reflection of the kind of person that he was, even though he had an admirable background, he — that still wouldn't make him a good juror." Such vague musing simply does not suffice to explain a peremptory challenge questioned under *Batson*; it is just as likely to mask impermissible considerations as to contain a legitimate justification. Because the reluctance to view photographic evidence was the only reason actually proffered for McCain's exclusion, and because the voir dire transcript does not support a contrary inference, we find the failure to challenge the similarly situated white juror to be fatal to the prosecutor's explanation.

We note that our decision in *Burks v. Borg*, 27 F.3d 1424 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1122 (1995), is distinguishable. In *Burks*, this court recognized that *Batson* is not violated "whenever prospective jurors of different races provide similar responses and one is excused while the other is

[1]The State further claims that the facial expression the prosecutor observed McCain make was a reason for his dismissal. However, the prosecutor stated only that it was because of the facial expression that she elicited the information about McCain's reluctance to view the photographs. And she later indicated that his nonverbal communication to her established a rapport and showed that he was "reacting and responding" to her.

not." 27 F.3d at 1429. Our *Batson* jurisprudence has always been tempered by the understanding that counsel is entitled to "take into account tone, demeanor, facial expression, emphasis — all those factors that make the words uttered by the prospective juror convincing or not." *Id.* When challenged, however, a prosecutor must give some expression to those instincts. In *Burks*, for example, the prosecutor explained that he did not believe that the struck jurors would impose the death penalty. *Id.*

Although *Burks* supports a party's right to treat minority and nonminority jurors differently where there are subjective differences between them, this court also has recognized that subjective justifications for challenges may be vulnerable to a comparative attack. *See Alcantar*, 897 F.2d at 439 (explaining, when a juror was challenged because he appeared "angry," that "defense counsel could have attempted to show that other jurors were more angry than he[, which] would have demonstrated that the issue of anger may have been a cover for a racially-based decision"); *Thompson*, 827 F.2d at 1260 (noting that defense counsel might be able to point out that a prosecutor's explanation, such as that a juror "looked sullen or glared at the prosecutor," is "pretextual because others similarly situated were allowed to serve"). Indeed, the *Burks* court itself made clear that a party cannot insulate an explanation from appellate review simply by couching it "in vague and subjective terms." *Burks*, 27 F.3d at 1429.

Moreover, the holding in *Burks* rested in part on the state trial court's contemporaneous inquiry into the prosecutor's reasons. *Id.* This court was reluctant to reverse the trial judge's findings on the basis of a "cold transcript" when the factfinder "was there to observe the jury selection — day in and day out for *six months*." *Id.* (emphasis added). In contrast, the posture of this case considerably undercuts the rationale for deferring to the trial court's findings.[2]

[2]The trial court's findings are accorded deference because the judge is presumed to have presided over jury selection and to have had the benefit

Finally, although the fact that the prosecutor accepted four African-Americans on the jury may be considered indicative of a nondiscriminatory motive, *id.*, it is not dispositive. *See Palmer v. Estelle*, 985 F.2d 456, 458 (9th Cir. 1993) ("[A] trial court may consider, but may not rely solely on, the existence of Blacks on a jury when determining whether a prosecutor has violated *Batson*.").[3] Where the prosecutor's explanation for striking a minority juror is unsupported by the record, empaneling other minority jurors will not salvage her discredited justification.

Accordingly, we conclude that a comparative analysis reveals racial reasons for the prosecutor's dismissal of McCain, and that the district court's finding to the contrary is clearly erroneous. *See Johnson*, 3 F.3d at 1331 ("When there is reason to believe that there is a racial motivation for the challenge, neither the trial courts nor we are bound to accept at face value a list of neutral reasons that are either unsup-

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of observing the conduct of voir dire. *See Jones v. Gomez*, 66 F.3d 199, 201 (9th Cir. 1995) ("[T]he ultimate determination of whether the prosecutor acted with discriminatory intent [ ] is a question of fact which turns primarily on an assessment of credibility.") (citation and internal quotation omitted), *cert. denied*, 116 S. Ct. 1437 (1996). Here, however, no fact-finder has had the benefit of contemporaneous explanations from the prosecutor. Although the magistrate judge observed the demeanor of the prosecutor firsthand, he did so six years after jury selection took place in state court. Moreover, there is no state court finding to presume correct on habeas review. *See Purkett v. Elem*, 514 U.S. 765, 769 (1995). The state trial court determined only that Turner had not established a prima facie case of discrimination, and this court already reversed that finding. *Turner I*, 63 F.3d at 814.

[3]In addition, the fact that the jury ultimately empaneled included several minority members does not mitigate the effect of a discriminatory peremptory challenge. There is no harmless error analysis with respect to *Batson* claims. *See Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (stating that among those constitutional rights so basic "that their infraction can never be treated as harmless error" is a defendant's "right to an impartial adjudicator, be it judge or jury") (citation and internal quotations omitted); *see also Vasquez v. Hillery*, 474 U.S. 254, 263 (1986).

ported in the record or refuted by it. Any other approach leaves *Batson* a dead letter.").[4] We are aware that our holding here places a heavy burden on the State to retry or release Turner. However, we agree with our colleagues on the Third Circuit that the remedy is a necessary one:

> Since we believe that the *Batson* Court placed the requirements of justice and equal protection above the burden placed on the [State] to retry the defendant before a jury from which no one has been excluded for a racially motivated reason, we conclude that the prosecution's failure to rebut [the defendant's] prima facie showing of racial discrimination as to one juror dictates the grant of a new trial. We recognize the burden placed on the [State] to retry [the defendant] after almost nine years have passed. Nevertheless, the intent of the Supreme Court in deciding *Batson* was to guarantee, both to the defendant desiring a jury trial and to the jury venirepersons, that the jury will be selected on a racially non-discriminatory basis.

Harrison v. Ryan, 909 F.2d 84, 88 (3d Cir. 1990).

C. Readback of Testimony to the Jury

[6] As to the effect of the readback of Mann's testimony, the record supports the district court's conclusion that Turner's absence from the jury room was harmless error. Habeas relief should be granted "[o]nly if the record demonstrates the jury's decision was substantially influenced by the trial error

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[4]Having reached this conclusion, we need not consider Turner's arguments concerning the remaining four prospective jurors. "[T]he striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors." *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987); *see also United States v. Bishop*, 959 F.2d 820, 827 (9th Cir. 1992).

or there is grave doubt about whether an error affected a jury." *Hegler v. Borg*, 50 F.3d 1472, 1478 (9th Cir.) (citation and internal quotation omitted), *cert. denied*, 116 S. Ct. 675 (1995); *see also Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Turner cannot establish "actual prejudice," and nothing in the witnesses' statements aroused "grave doubt" about whether the error had injurious effect. *See O'Neal v. McAninch*, 513 U.S. 432, 435 (1995) (defining grave doubt to mean "that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error").

[7] The court reporter explained that her general practice was to repeat testimony in a monotone, avoiding any emphasis or facial expression, that she had no reason to believe she deviated from that manner in Turner's case, and that she did not recall any extraneous communication with the jury. As in *Hegler*, the evidence produced at the hearing indicated that the court reporter read the testimony without inappropriate inflection or comment. *See* 50 F.3d at 1478; *cf. Lee v. Marshall*, 42 F.3d 1296, 1298 (9th Cir. 1994) (finding that intrusion of two police officers into the jury room to set up a tape player was harmless error because "their entry was innocuous"); *United States v. Kupau*, 781 F.2d 740, 742 (9th Cir. 1986) (finding error harmless where there was no indication that the jury and the case agent did not heed the judge's admonition that the agent was to be a "nonentity" while playing back taped evidence). And even though the testimony in question involved the key forensic evidence linking Turner to the murder, potent circumstantial evidence also supported the jury's verdict, including Turner's possession of property stolen from the victim on the night of the murder and his own inconsistent statements. There is no evidence of improper conduct or prejudicial impact, and we conclude that the district court did not clearly err in finding the error harmless.

IV. Conclusion

For the foregoing reasons, we vacate the district court's denial of the writ of habeas corpus and remand with instruc-

tions to enter an order stating that Turner is entitled to a new trial.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT TURNER, Petitioner, v. CHARLES D. MARSHALL, Respondent.	No. CV 92-4525-LGB(JR) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE ON PETITION FOR WRIT OF HABEAS CORPUS BY STATE PRISONER 18 U.S.C. § 2254

This Report and Recommendation is submitted to the Honorable Lourdes G. Baird, United States District Judge, pursuant to the provisions of 28 U.S.C. Section 636 and General Order 194 of the United States District Court for the Central District of California

BACKGROUND

Petitioner Robert Turner was convicted by a jury of first degree murder, residential burglary and residential robbery. The jury found, as special circumstances, that the petitioner committed murder

in the course of committing burglary and robbery and that the petitioner used a deadly weapon in committing all three crimes. The petitioner was sentenced to state prison for life without the possibility of parole for first degree murder, and the sentences for the other convictions were stayed.

The California Court of Appeal affirmed the judgment. The California Supreme denied the petition for review. The District Court for the Central District of California denied the petition for writ of habeas corpus. The United States Court of Appeals for the Ninth Circuit affirmed in part, vacated in part, and remanded for an evidentiary hearing. This Court held an evidentiary hearing on April 25, 1996, to determine (1) whether the peremptory challenges exercised by the prosecutor constituted a *Batson* violation and (2) whether the readback of expert testimony outside the presence of the petitioner constituted harmless error.

DISCUSSION

I. Use of Peremptory Challenges

The Ninth Circuit held that the petitioner established a prima facie case of a *Batson* violation and that the burden shifted to the government to articulate a race-neutral basis for the peremptory challenges. *Turner v. Marshall*, 63 F.3d 807, 812-14 (9th Cir. 1995). However, a facially valid explanation by the prosecutor does not have to rise to the level of a challenge for cause. *United States v. Lorenzo*, 995 F.2d 1448, 1454-55 (9th Cir. 1993). In fact, such explanations need not be logical since they are often founded on a trial lawyer's instinct. *Id.* at 1455.

This Court found the testimony of Vivian Davison, the prosecutor at the petitioner's trial, to be credible. The prosecutor gave facially valid race-neutral reasons for exercising peremptory challenges against each of the African-American venirepersons in question: (1) Romeo McCain's hesitancy to view crime photographs appeared

incongruous with his Vietnam War veteran background; (2) Lula Bragg's lack of friends at the Sheriff's Department despite her long-term employment at the jail as well as her characterization of inmates as "trapped in the system" raised suspicions about her defense bias; (3) Darnelle Fuga's isolationist attitude indicated her unwillingness to talk to other jurors and arrive at a reasonable verdict; (4) Freddie Blacknell's hiring of an attorney to defend him on "traffic tickets" raised questions about his bias against law enforcement; (5) Duane Ragland's soft spoken demeanor and proud attitude about being in a minority opinion created doubts about his ability to an effective juror. This Court did not find the stated reasons to be pretexts for purposeful discrimination. Therefore, no *Batson* violation occurred.

II. Readback of Expert Testimony

The Ninth Circuit held that the readback of expert testimony outside the presence of the

petitioner violated his Sixth Amendment right to confrontation and that the government must show harmless error. *Turner*, 63 F.3d at 814-15.

Kathryn Miller, the certified shorthand reporter who conducted the readback at the petitioner's trial, testified that it was her custom to not emphasize any portion of the testimony, to not use any particular inflection, and to not make any facial expressions. (HT[1] at 64-65). The reporter also testified that she had no reason to believe that she deviated from her custom in the petitioner's case. (HT at 67). Rosemary Miller, a juror at petitioner's trial, also testified that she recalled the readback but remembered nothing remarkable or irregular about it. (HT at 48).

Additionally, the prosecution was not present at the readback and the readback did not contain any new evidence, thereby eliminating the possibility of unfair prejudice. In any event, there

1. "HT" refers to the transcript of the evidentiary hearing held on April 25, 1996 before this Court.

was evidence other than the expert testimony on blood tests that established the petitioner's guilt.[2/] Therefore, there was harmless error.

CONCLUSION

For the reasons stated above, it is recommended that the petition for writ of habeas corpus be DENIED.

DATED: This 28th day of June, 1996.

JOSEPH REICHMANN
United States Magistrate Judge

---

2. The police arrested the petitioner while he was driving the victim's car and in possession of an initialized gold ring, two teeth and other items belonging to the victim. The petitioner testified that Donna, a girl living with his brother, asked if he would get rid of some things for her. Unbeknownst to him, she directed him to the victim's car and they drove to the victim's house where they loaded some items into the car. However, Donna testified that she did not meet with the petitioner on the day of his arrest and that she did not speak to him about stolen merchandise. Donna also testified that she never saw the victim's car nor did she ever know the victim. Additionally, a parking citation was issued to the victim's car near the petitioner's apartment.

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT TURNER, Petitioner, v. CHARLES D. MARSHALL, Respondent.	No. CV 92-4525-LGB(JR) **FILED JULY 30, 1996** ORDER ADOPTING THE MAGISTRATE JUDGE'S FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

Pursuant to 28 U.S.C. Section 636(b)(1)(B), the Court has reviewed the pleadings and all papers herein, the Report and Recommendation, the objections, and adopts the findings, conclusions and recommendations of the United States Magistrate Judge.

IT IS ORDERED that Judgment be entered dismissing the petition.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order by United

States mail on the petitioner and respondent.

DATED: July 29, 1996

LOURDES G. BAIRD
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT TURNER, Petitioner, v. CHARLES D. MARSHALL, Respondent.	No. CV 92-4525-LGB(JR) **FILED JULY 30, 1996** FINAL AND RECOMMENDATION

This Final Report and Recommendation and the attached Report and Recommendation are submitted to the Honorable Lourdes G. Baird, United States District Judge pursuant to the provisions of 28 U.S.C. Section 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

On June 28, 1996, the Clerk filed a Notice of Filing of Magistrate Judge's Report and Recommendation and Lodging of Proposed

Judgment, which was served on the parties, together with copies of the Magistrate Judge's Report and Recommendation.

Objections were filed on July 11, 1996.

IT IS THEREFORE RECOMMENDED that this Court issue an Order approving and adopting the Report and Recommendation and dismissing the petition.

DATED: July 12, 1996.

JOSEPH REICHMANN
United States Magistrate Judge

APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT TURNER, Petitioner, v. CHARLES D. MARSHALL, Respondent.	No. CV 92-4525-LGB(JR) **FILED JULY 30, 1996** JUDGMENT

IT IS ADJUDGED that the petition is dismissed.

DATED: July 29, 1996.

LOURDES G. BAIRD
UNITED STATES DISTRICT COURT
JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT S. TURNER, Petitioner, v. CHARLES D. MARSHALL, Respondent.	No. 96-56462 DC No. CV 92-04525-LGB **FILED SEP. 29, 1997** ORDER

Before: FLETCHER, PREGERSON and D.W. NELSON, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judges Fletcher and Pregerson voted to reject the suggestion for rehearing en banc, and Judge D.W. Nelson recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge

has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
JAN 28 1998
CLERK

No. 97-1071

In The

Supreme Court of the United States

October Term, 1997

CHARLES D. MARSHALL, Warden; DANIEL E. LUNGREN,
Attorney General of the State of California,

Petitioners,

v.

ROBERT S. TURNER,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CHARLES D. MARSHALL, Warden; DANIEL E. LUNGREN,
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ROBERT S. TURNER,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Motion of Respondent Robert S. Turner to Proceed in Forma Pauperis

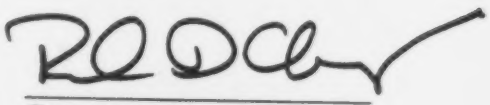
Respondent, Robert S. Turner, respectfully moves for leave to file the attached Brief in Opposition to Petition for Writ of Certiorari and to proceed in this case *in forma pauperis*. Respondent has previously been granted leave by the United States District Court and the United States Court of Appeals for the Ninth Circuit to proceed in forma pauperis. On October 12, 1995 the United States District Court for the Central District of California appointed Richard D. Cleary to represent Respondent pursuant to 18 U.S.C. § 3006A. That representation has continued through the filing

of this motion and the accompanying Brief in Opposition to Petition for Writ of Certiorari.

Respectfully submitted,

Dated: January 28, 1998

RICHARD D. CLEARY



Counsel for Respondent
Robert S. Turner

QUESTION PRESENTED

Whether the Court of Appeals erred when it held (i) that the evidence presented at the hearing in the District Court established racial discrimination in violation of *Batson v. Kentucky* at Respondent's 1990 California state court trial, and (ii) that the District Court's decision to the contrary was clearly erroneous.

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STATEMENT OF THE CASE

A. State Court Proceedings

Respondent Robert Turner was convicted in 1990 in the Superior Court for the State of California, County of Los Angeles, of murder, robbery and burglary.

During jury selection, the prosecutor used five of nine peremptory challenges to exclude African-Americans. When the jury was seated, all of the African-American men in the jury pool had been challenged or excused. Turner's counsel made a timely objection at trial that the prosecutor had used her peremptory challenges to exclude African-American jurors because of their race. The state trial judge concluded that Turner had not established a "pattern of individual discrimination" and declined to require the prosecutor to explain her reasons for excluding the five African-American jurors.

The Superior Court sentenced Turner to life imprisonment, without the possibility of parole. The California Court of Appeal affirmed Turner's conviction and the California Supreme Court denied Turner's petition for review.

B. Initial Proceedings in the District Court

Turner filed a pro se habeas corpus petition in the District Court in July 1992. The District Court dismissed the petition and entered judgment against Respondent.

C. Respondent's First Federal Appeal

In a published opinion, the Ninth Circuit Court of Appeals reversed the District Court's dismissal of Turner's petition on two grounds. First, the Court of Appeals held that Turner had established a prima facie case of racial discrimination by the prosecutor

in the exercise of her peremptory challenges and that the state trial court erred when it failed to require the prosecutor to explain her challenges. The Court of Appeals also held that "constitutional trial error" had occurred when the state trial court permitted the court reporter to read testimony to the jury outside the presence of Mr. Turner and his counsel. *Turner v. Marshall*, 63 F.3d 807 (9th Cir. 1995).

The Court of Appeals held that the circumstances surrounding the prosecutor's exercise of her peremptory challenges, when taken as a whole, raised an inference of discrimination in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). The Court first considered the fact that "the prosecutor had used peremptory challenges to exclude five African-Americans out of a possible nine African-American venirepersons." 63 F.3d at 812. While recognizing that the prosecutor had accepted some African-American jurors, and acknowledging that this weighed against Turner's claim of discrimination, the Court held that this was not dispositive. Instead, the Court concluded that "the prosecutor's exclusion of five out of nine available African-American venirepersons removed a sufficient percentage of African-Americans to establish a pattern of discrimination." *Turner v. Marshall*, 63 F.3d at 813.

The Court found further evidence of discrimination in the fact that although "approximately 30 percent (11 out of 37) of the venirepersons who appeared before the court for voir dire were African-American," the prosecutor used 56% of her peremptory challenges to remove African-Americans. *Id.* "Thus, two different statistics -- the percentage of available African-Americans challenged, and the percentage of peremptory challenges used against African-Americans -- provide support for an inference of discrimination." *Id.*

The Court of Appeals also found that the record showed that the "state trial judge may have impermissibly relied on the fact that African-Americans and other minorities remained on the jury, without considering other factors." 63 F.3d at 814. The Court emphasized that the "exclusion of a single minority juror on account of race would constitute a *Batson* violation," and that a trial court may not deny a *Batson* motion based solely on the fact that some African-Americans remain on the jury.

Considering the facts and circumstances as a whole, the Court concluded that "Turner established a prima facie case of a *Batson* violation, such that the state trial court erred in failing to inquire into the prosecutor's reasons for the peremptory challenges." *Id.* The Court of Appeals therefore remanded the case to the District Court with instructions "to conduct an evidentiary hearing at which it must elicit the prosecutor's motives at the time of the voir dire in order to determine whether there was a *Batson* violation." *Id.*

Petitioners did not seek review of the Ninth Circuit's judgment in this Court.

D. Proceedings on Remand in the District Court

The District Court (by a Magistrate Judge) conducted an evidentiary hearing on April 25, 1996. There were four witnesses at the hearing: the Deputy District Attorney who was the prosecutor at Respondent's 1990 trial; the court reporter at Respondent's trial; one of the jurors at Respondent's trial; and Respondent. Following the evidentiary hearing, the Magistrate Judge issued a Report recommending that the petition be dismissed and the District Court entered judgment dismissing the petition.

E. Respondent's Second Federal Appeal

The Ninth Circuit, in the judgment from which Petitioners seek review, reversed the District Court. *Turner v. Marshall*, 121 F.3d 1248 (9th Cir. 1997). Applying the clearly erroneous standard, the Court of Appeals found that the District Court had erred when it accepted the prosecutor's explanation for her peremptory challenge to juror Romeo McCain, an African-American man. In particular, the Court of Appeals found that the explanation given by the prosecutor – that she dismissed McCain because he was hesitant to look at gruesome crime photographs – was a pretext for racial discrimination. The Court of Appeals based its determination that the explanation for the challenge to McCain was a pretext upon a comparison of the prosecutor's explanation for her challenge to McCain and the prosecutor's acceptance of a white woman – Rosemary Battaglia – who had "expressed even greater reluctance to view the photographs" than McCain. 121 F.3d at 1251-1254.

In finding that the record clearly established that the explanation for the challenge to McCain was racially discriminatory, the Court of Appeals considered various factors, including the following:

- The prosecutor unequivocally testified that the only explanation she could offer for her challenge to McCain was his reluctance to look at crime photographs. This case, therefore, was not one in which a "prosecutor offered several explanations for a peremptory strike, and a seated juror shares *some* of the same characteristics cited as justifications." 121 F.3d at 1253 (emphasis in original).

- Petitioners' argument that the prosecutor dismissed McCain because his hesitance to look at crime photographs was incongruous with McCain's military service in Vietnam -- which the Magistrate Judge adopted in his findings of fact -- was unsupported by the prosecutor's testimony at the evidentiary hearing.
- There was no contemporaneous inquiry by the state court into the prosecutor's reasons for challenging McCain or the four other African-Americans that she dismissed by peremptory challenge. The inquiry mandated by *Batson v. Kentucky* did not take place until 1996 (in the District Court), six years after Respondent's state court trial. That hearing was presided over by a Magistrate Judge who had not observed jury selection or any other part of Respondent's trial. Thus, although the Magistrate Judge "observed the demeanor of the prosecutor firsthand, he did so six years after jury selection took place in state court." 121 F.3d at 1254 n.2.

The Court of Appeals "conclude[d] that a comparative analysis reveals racial reasons for the prosecutor's dismissal of McCain, and that the district court's finding to the contrary is clearly erroneous." 121 F.3d at 1255.

REASONS FOR DENYING THE PETITION

I

Review is Not Appropriate to Determine Whether the Court of Appeals Erroneously Evaluated the Evidence or Misapplied *Batson v. Kentucky*

This Court's Rule 10 provides that review "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Analysis of the Court of Appeals' decision shows that asserted error necessarily falls into one of these two categories.

Petitioners do not seek review of the Court of Appeals' holdings on Respondent's first federal appeal that (i) Respondent established a prima facie case of racial discrimination at his trial, (ii) the state trial court erred when it failed to require the prosecutor to explain the reasons for her peremptory challenges to five African-American jurors, and (iii) Respondent was entitled to an evidentiary hearing in the District Court under *Batson v. Kentucky*.

Petitioners seek review only of the Court of Appeals' decision reversing the District Court's judgment following the evidentiary hearing on remand. The essence of that decision is the Court of Appeals' determination that the evidence Respondent presented in the *District Court* was sufficient to establish racial discrimination by the prosecutor at Respondent's state court trial in violation of his rights under the Fourteenth Amendment.

The Court of Appeals' decision does not raise any issue with respect to review of *state court* fact finding. The Court of Appeals determined in Respondent's first federal appeal that the state court trial court committed legal error when it failed to require the prosecutor to explain the reasons for her peremptory challenges and, therefore, there were no state court fact findings entitled to a presumption of correctness. *Turner v. Marshall*, 63 F.3d at 814 n.4. On remand following that decision, the District Court made findings – for the first time – regarding the prosecutor's motives when she used peremptory challenges to remove five African-Americans from the jury.

Whether the District Court or the Court of Appeals was correct in its weighing of the evidence regarding the prosecutor's motives, there is no question that Respondent was entitled to relief if the prosecutor challenged juror McCain because of his race. This Court held in 1986, in *Batson v. Kentucky*, that a prosecutor violates a defendant's rights under the equal protection clause of the Fourteenth Amendment if she uses a peremptory challenge to remove a juror for racially-motivated reasons. 476 US. at 93-98. Respondent was tried in the California court system in 1990, well after the decision in *Batson*. Accordingly, there is no issue regarding retroactive application of *Batson* to the claims made by Respondent in his habeas corpus petition.

At heart, Petitioners' grievance is their dissatisfaction with the Court of Appeals' determination that the prosecutor at Respondent's trial challenged juror McCain because of his race. If this Court were to grant review and hear this grievance, it would be required to reweigh the evidence already considered by the

Court of Appeals to determine whether the District Court or the Court of Appeals reached the right result. As recognized in Rule 10, such issues are not appropriate for review by this Court under its certiorari jurisdiction.

II

The Court of Appeals' Decision Will Not Have Any Impact On State Court Decision-Making in *Batson* Cases

Petitioners misread the decision of the Court of Appeals when they suggest (Petition at 10) that it "impose[s] on California" the requirement that it use "comparative analysis" when reviewing trial court rulings on *Batson* motions. Nothing in the Court of Appeals' opinion compels California appellate courts, or courts in any other state, to engage in comparative analysis when reviewing rulings on *Batson* rulings. Indeed, the Court of Appeals' decision does not even mandate that federal courts in the Ninth Circuit engage in "comparative analysis" whenever they review state court fact finding in *Batson* rulings.

The crucial fact that Petitioners overlook is that the Ninth Circuit's decision involves review of *federal court* fact finding, albeit in the exercise of its habeas corpus jurisdiction. In doing so, the Court of Appeals observed that "comparative analysis is a well-established *tool* for exploring the possibility that facially race-neutral reasons are a pretext for discrimination." 121 F.3d at 1251-1252 (emphasis added). The Court of Appeals did not hold that comparative analysis is constitutionally mandated.

More importantly, the Court of Appeals did not suggest, much less hold, that the California courts erred by not comparing the jurors struck (and the prosecutor's

explanations for striking those jurors) with the characteristics of the jurors that the prosecutor accepted for the panel. Indeed, the Court of Appeals had no opportunity to make such a criticism of the California courts because the California courts never required the prosecutor to explain why she challenged the African-American jurors. The prosecutor first gave those explanations when she testified in federal court in 1996, six years after Respondent's state court trial. The Ninth Circuit's use of comparative analysis was nothing more, as it acknowledged, than a tool in reviewing the district court's findings of fact under the clearly erroneous standard.

The Court of Appeals, moreover, was fully mindful of its obligation to give deference to state trial court findings on the issue of discriminatory intent. The Court carefully distinguished its earlier decision in *Burks v. Borg*, 27 F.3d 1424 (9th Cir. 1994), *cert. denied*, 513 U.S. 1160 (1995), where the Ninth Circuit held that it will continue to give great deference to state trial court findings of fact in *Batson* cases, even where the California appellate courts decline to engage in a comparative analysis. As the Court of Appeals explained, "the holding in *Burks* rested in part on the state trial court's contemporaneous inquiry into the prosecutor's reasons." 121 F.3d at 1254. By contrast, in this case

> "no factfinder has had the benefit of contemporaneous explanations from the prosecutor. Although the magistrate judge observed the demeanor of the prosecutor firsthand, he did so six years after jury selection in state court. Moreover, there is no state court finding to presume correct on review. The state trial court determined only that Turner had not established a prima facie case discrimination, and this court has already reversed that finding."

121 F.3d at 1254 & n.2 (citations omitted).

This case poses no threat to the legitimacy of the fact-finding procedures used by the California Courts in reviewing claims under *Batson*.

III

The Petition Presents No Substantial Question Under *Teague v. Lane*

Petitioners devote great effort to criticizing the Ninth Circuit Court of Appeals and its supposed reluctance to apply the rule of *Teague v. Lane*, 489 U.S. 288 (1989). Petitioners' attacks on the Ninth Circuit notwithstanding, this case presents no genuine issue under *Teague*.

The defect in Petitioners' argument is that the Court of Appeals did not announce any new constitutional rule. *Teague* holds that "new *constitutional rules* of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310 (emphasis added). As shown above, the Ninth Circuit did not decide that the California Courts committed constitutional error by not using "comparative analysis" to review Respondent's claim under *Batson*. Nor did the Ninth Circuit hold that use of comparative analysis is required by the constitution. The Ninth Circuit simply held that use of comparative analysis was a useful tool in reviewing the District Court's findings of fact -- under the clearly erroneous standard -- following an evidentiary hearing *in the District Court*.

The constitutional rule that the Court of Appeals did apply -- the prohibition against racially-motivated peremptory challenges established in *Batson v. Kentucky* -- was the law before Respondent was brought to trial. The Ninth Circuit did not

announce or apply a "new rule," and this case presents no genuine issue under *Teague v. Lane*.

IV

There is No Conflict Among the Circuits or Between the State and Federal Courts That Merits Review

Petitioners argue that the decision of the Ninth Circuit is in conflict with the California Supreme Court and the Fourth Circuit, which, according to Petitioners, "have held that, for purposes of *Batson*, an appellate court should not compare the responses of accepted jurors with those of stricken jurors." Petition at 4. As will be seen, the decision of the Fourth Circuit to which Petitioners refer is not in conflict with the decision of the Court of Appeals in this case. And any divergence between the California Supreme Court's decisions and the decision of the Court of Appeals in this case is not a conflict on "an important federal question" that merits review under this Court's certiorari jurisdiction.

A. There is No Conflict Among the Circuits

Petitioners' argument that there is a conflict among the circuits relies solely on a purported disagreement regarding "comparative analysis" between the Ninth Circuit, in its decision below, and the Fourth Circuit in *United States v. McMillon*, 14 F.3d 948, 953-954 n. 5 (4th Cir. 1994). *See* Petition at 7. The problem with Petitioners' argument is that it misstates the holding in *McMillon*.

The appellant in *McMillon* argued that discriminatory intent can be established by comparing the characteristics of a white juror accepted by the prosecutor and an African-American juror challenged by the prosecutor. In doing so, she relied on the

Eighth Circuit's decision in *Reynolds v. Benefield*, 931 F.2d 506, 512 (8th Cir.), *cert. denied*, 501 U.S. 1204 (1991), that "the government may not justify peremptory challenges to venire members of one race unless venire members of another race with comparable or similar characteristics are also challenged." While the Fourth Circuit stated in *McMillon* that *Benefield* is "not the law of this Circuit," it expressly declined to decide whether to follow *Benefield*:

> "[W]hile defense counsel argues in his briefs on appeal that one of the seated members of the jury met the characteristics of the struck juror, there was no evidence introduced into the record on this point. Given these circumstances, it would be improper to address the rule of *Benefield* on its merits."

14 F.3d at 953 n.5. Accordingly, because the Fourth Circuit never addressed the merits of comparative analysis, its decision in *McMillon* is not in conflict with the Ninth Circuit's decision in this case.

B. There is No Conflict between the Ninth Circuit and the California Supreme Court on an Important Question of Federal Law

Petitioners are correct that the California Supreme Court has declined to use comparative analysis in reviewing decisions denying relief under *Batson,* provided that the trial court has made "a 'sincere and reasoned effort' to evaluate the nondiscriminatory justifications offered . . . ." *People v. Montiel*, 5 Cal. 4th 877, 909, 21 Cal. Rptr. 2d 705, 855 P.2d 1277 (1993), *cert. denied*, 512 U.S. 1253 (1994); *see People v. Johnson*, 47 Cal. 3d 1194, 1216-1221, 255 Cal. Rptr. 569, 767 P.2d 1047 (1989), *cert. denied*, 494 U.S. 1038 (1990). The fact that the California courts, on the one hand, and the Ninth Circuit and other federal courts on the other, have taken somewhat differing approaches to review of *Batson* claims is insufficient to create a

conflict on an "important *federal* question," the necessary predicate for this Court's exercise of its certiorari jurisdiction.

As the Ninth Circuit recognized, comparative analysis is only a *tool*. It will sometimes be helpful in considering whether there was discrimination; in other cases it will be of no value. It was particularly appropriate in this case because of the failure of the state trial court to require contemporaneous explanations by the prosecutor for her peremptory challenges and the resulting lack of any findings of fact to be given deference on habeas review. Moreover, nothing in the Ninth Circuit's decision even implies that comparative analysis is constitutionally mandated in *Batson* cases.

The Ninth Circuit's approval and use of comparative analysis in this case does not create a conflict with the California Supreme Court on an important matter of federal law. The California courts remain free to adopt or reject evidentiary rules and fact-finding "tools" as they deem appropriate, provided only that those procedures comport with the minimum requirements of due process under the federal constitution. This is consistent with basic principles of federalism, which permit the state courts to develop and use their own rules of criminal procedure and evidence, subject only to the limitations imposed by the constitution of the United States. The federal courts, likewise, are free to different employ fact-finding tools than the state courts in California and elsewhere. These differing approaches, all consistent with the constitution, are nothing more than an example of federalism in action.

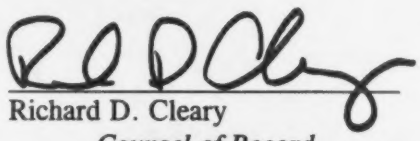
Conclusion

The only issue presented by this case is whether the record supports the Ninth Circuit's interpretation of the evidence presented in the District Court. If the Ninth Circuit was correct, Respondent was indisputably entitled to relief under the rule of established in *Batson v. Kentucky*.

This Court's function is to decide important issues of federal law, not to reweigh the evidence presented in the lower courts. Respondent, accordingly, requests that the Court deny the Petition for a Writ of Certiorari.

Dated: January 28, 1998

Respectfully submitted,



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No. 97-1071

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

CHARLES D. MARSHALL, Warden; DANIEL E. LUNGREN, Attorney General of the State of California, *Petitioners*,

v.

ROBERT S. TURNER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997
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CHARLES D. MARSHALL, Warden; DANIEL E. LUNGREN, Attorney General of the State of California, *Petitioners*,

v.

ROBERT S. TURNER, *Respondent*.

ARGUMENT

THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS VIOLATED TEAGUE v. LANE, 489 U.S. 288 (1989) AND CREATED A CONFLICT AMONG CIRCUITS BY REQUIRING A "COMPARATIVE ANALYSIS" OF JURORS WHEN REVIEWING A CLAIM UNDER BATSON v. KENTUCKY, 476 U.S. 79 (1986)

In opposing a grant of certiorari, the respondent prisoner begins by stating the familiar rule that certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Opp. 6. Indeed, for that reason the state did not seek review from this Court of the Ninth Circuit's original holding that a prima facie case of racial discrimination had been established. *Turner v. Marshall*, 63 F.3d 807 (9th Cir. 1995)(*Turner I*).

It was only after the Ninth Circuit took the additional step of becoming the first federal appellate court to invoke a new rule of comparative juror analysis

on habeas review to upset the finality of a state court judgment that the state asked this court to review the case. *Turner v. Marshall*, 121 F.3d 1248 (9th Cir. 1997) (*Turner II*).

Respondent also tries to discourage the Court from review by minimizing the case as merely involving an issue of sufficiency of the evidence. Likewise, he complains that a grant of certiorari would only operate to settle a disputed factual issue. P. 6. Respondent's attempt to downplay the Ninth Circuit's published holding, and thereby elude review, does not survive even a casual reading of the Ninth Circuit's opinion. The case represents a far-reaching new rule of the Ninth Circuit that instructs district courts to conduct their own comparison of stricken versus accepted jurors even when the state courts have forbidden it. This decision thus represents far more than a decision regarding sufficiency of the evidence -- the question is nothing less than whether *every* pending habeas petition in the Ninth Circuit raising a *Batson* claim (*Batson v. Kentucky*, 479 U.S. 79 (1986)), can now be subjected to the new rule of comparative analysis set forth in this published decision. Similarly, respondent misplaces emphasis on the fact that the Ninth Circuit's decision "does not raise any issue with respect to review of *state court* fact finding" (Opp.7), as though the fact that the underlying evidentiary hearing was held in a federal court eliminates any concerns about federalism, comity and finality. He prefers to characterize the case as only involving issues of fact-finding procedures in the federal courts. He misses the point that the federal court is here requiring a certain procedure, never endorsed by this Court, and will overturn a state conviction for failing to adhere to it. The Ninth Circuit is effectively ordering California to adopt this rule of procedure because otherwise future state cases will face the same fate as this case-if the state court fails to conduct comparative review there will eventually be a day of

reckoning in the Ninth Circuit. The Ninth Circuit's new rule of comparative review directly threatens interests of federalism, irrespective of whether the factual findings (ironically rejected by the Ninth Circuit panel) were made by a United States District Court judge rather than a state judge. In either circumstance the new rule remains. Stated another way, respondent is apparently claiming that this case could be limited to applying only in circumstances in which a federal court, rather than a state court, conducts the evidentiary hearing. But the opinion is obviously not confined to such a circumstance and will be invoked by habeas petitioners throughout the Ninth Circuit as the basis for granting a writ regardless of whether the state court has conducted a fact-finding inquiry. In short, Rule 10's restrictions on review have nothing to do with the issue of general importance presented in this case.

Respondent also argues that the Ninth Circuit's decision will not have any impact on state court decisions in *Batson* cases. In doing so he only further misconstrues the Ninth Circuit's holding when he contends that the opinion does not *compel* state courts to engage in a comparative analysis, but merely *suggests* that such analysis is a helpful -- but not constitutionally required -- "tool." Opp. 8. This is just a distortion of the opinion. Apparently respondent assumes that a decision only 'requires' a new rule if the opinion explicitly says that the new rule is 'required' or mandatory. In respondent's view, at least for the proposes of opposing certiorari, a federal district court within the Ninth Circuit is free to reject the published holding in this case on the grounds that nowhere in the opinion does the panel explicitly say that their new rule *must* be followed. In fact, however, a state court in California that continues to adhere to California's prohibition on comparative analysis now surely invites reversal by the Ninth Circuit under the authority of this case.

Respondent also says that state court rulings will not be affected by this case because the Ninth Circuit "did not hold that comparative analysis is constitutionally mandated." Opp. 8. That interpretation only misunderstands the nature of habeas review. Habeas relief is only available to a person whose custody violates the Constitution. *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S.Ct. 475, 480, 116 L.Ed. 385 (1991). And the Ninth Circuit was only able to invent a Constitutional violation in this case by announcing and enforcing this new rule of comparative analysis. The Ninth Circuit is not free to overturn a state conviction of murder in the absence of a constitutionally mandated rule. If respondent *were* correct, and the Ninth Circuit has *not* held that comparative analysis is not required by the Constitution, then that court necessarily lacked a sufficient basis to grant habeas relief.

Respondent uses the same misimpression to skate over the obvious *Teague* implications (*Teague v. Lane*, 489 U.S. 288 (1989) of this case. As the state argued above, if the Ninth Circuit did *not* consider comparative analysis to be a constitutionally compelled rule, the rule has no business in this habeas case.

Finally, respondent argues that even though California law has been undermined on the subject of *Batson* hearings, there is no conflict between circuits as a result of this case. In response to the state's citation of *United States v. McMillon*, 14 F. 3d 948, 953-54 (4th Cir. 1994), respondent argues that the Fourth Circuit in *McMillon* has only left the issue of comparative analysis for another day. Opp. 11-12. But the state accurately described the legal landscape in the petition for a writ of certiorari. The Fourth Circuit has not approved comparative analysis and California has rejected it. The Ninth Circuit has become the first federal court to announce the new rule of comparative review, and has applied it in order to grant a writ. The Ninth Circuit's

opinion thus creates a conflict of constitutional law, certainly with respect to California and by implication with the Fourth Circuit, sufficient to justify relief from this Court. At a minimum, this case is appropriate for summary disposition.

It should be noted, in conclusion, that respondent's only attempt to acknowledge *Teague* consists of his misconception that this new rule of comparative review is somehow a voluntary, non-constitutional device. Aside from that, his opposition offers no defense of either the *Teague* violation or the circuit's chronic failure to enforce *Teague*. The Ninth Circuit panel similarly failed to respond to the state's *Teague* argument even after a request for rehearing on that basis. The silence is understandable. The *Teague* violation is apparent.

CONCLUSION

For the foregoing reasons, the petitioners request that a writ of certiorari issue in this case.

Dated: February 9, 1998.

Respectfully submitted,

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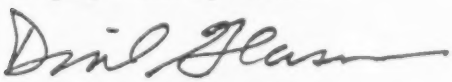

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